

University of Michigan Journal of Law Reform

Volume 28

1995

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Recommended Citation

Nicole B. Cásarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 U. MICH. J. L. REFORM 249 (1995).

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FURTHERING THE ACCOUNTABILITY PRINCIPLE IN PRIVATIZED FEDERAL CORRECTIONS: THE NEED FOR ACCESS TO PRIVATE PRISON RECORDS

Nicole B. Cásarez*

As American prisons face unprecedented overcrowding, both the federal and various state governments have engaged private entrepreneurs to operate correctional facilities on a for-profit basis. In the federal context, one overlooked consequence of prison privatization involves decreased public access to prison records. When a federal agency delegates a public function, like the provision of correctional services, to a private contractor, the agency frustrates the purpose of the Freedom of Information Act. Prison records that otherwise would have been available to the public become insulated from disclosure by virtue of the contractor's nonagency status. To safeguard prisoners' liberty interests and well-being, this Article argues that private federal prisons must be just as accountable to the public as public prisons. Congress should therefore enact legislation subjecting private federal prison records to disclosure under the Freedom of Information Act as part of a comprehensive program to monitor and oversee private prison operators.

INTRODUCTION

In the great prison privatization¹ debate,² both advocates and opponents of privatizing prisons agree on the importance of

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1. Because of its wide range of meanings, "privatization" aptly has been described as a "fuzzy concept." Paul Starr, *The Meaning of Privatization*, 6 YALE L. & POL'Y REV. 1, 6 (1988). In this Article, the term refers to government contracting with a private entity to manage and operate an entire correctional facility or system. Used in this sense, "privatization" would not include publicly operated prisons that contract out ancillary functions, such as laundry, medical or food services, or any other involvement by the private sector in operating prison industries.

2. The literature on prison privatization is copious. For a sampling of the commentary on political, legal, and economic issues raised by proprietary prisons, see PRIVATIZING CORRECTIONAL INSTITUTIONS (Gary W. Bowman et al. eds., 1993) and PRIVATE PRISONS AND THE PUBLIC INTEREST (Douglas C. McDonald ed., 1990). For a detailed bibliography regarding private prisons, see Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 796-854 (1989).

accountability.³ As part of the criminal justice system, prisons serve the public interest by confining, punishing, and, hopefully, rehabilitating those convicted. Correctional facilities and their operation affect directly the liberty interests of those incarcerated within them. If the state entrusts full management responsibilities for its prisons to private contractors, it should ensure that these contractors in no way abuse the public trust or prisoners' rights.⁴

One often overlooked but relevant difference between the accountability of public and private federal prisons⁵ involves public access to prison records. To illustrate this difference, consider the following example.

Along the United States-Mexico border, summer temperatures are brutal. In its 1991 study, *Prison Conditions in the United States*,⁶ Human Rights Watch reported that at several U.S. Immigration and Naturalization Service (INS) detention centers, detainees are forced to remain outdoors for many hours a day in the intense heat.⁷ Could an enterprising reporter demand access to INS records to document this or other

3. See, e.g., Joan W. Allen, *Use of the Private Sector in Corrections Service Delivery*, in *THE PRIVATE SECTOR IN STATE SERVICE DELIVERY: EXAMPLES OF INNOVATIVE PRACTICES* 13, 38-39 (The Council on State Governments & The Urban Institute eds., 1989) (arguing that before contracting for private prison operations, a state should design and implement an effective monitoring system); Warren I. Cikins, *Privatization of the American Prison System: An Idea Whose Time Has Come?*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 445, 458-59 (1986) (writing that careful monitoring and strong conflict of interest statutes are necessary to avoid corruption in private prisons); Michael Keating, Jr., *Public Over Private: Monitoring the Performance of Privately Operated Prisons and Jails*, in *PRIVATE PRISONS AND THE PUBLIC INTEREST*, *supra* note 2, at 130 (positing that the contracting agency must develop clear operational standards and effective monitoring techniques to ensure accountability); cf. CHARLES H. LOGAN, *PRIVATE PRISONS: CONS AND PROS* 210 (1990) (stating that monitoring and "motivation" are equally important for public and private prisons).

4. See, e.g., Mary R. Woolley, *Prisons for Profit: Policy Considerations for Government Officials*, 90 DICK. L. REV. 307, 310 (1985) (stating that the government must oversee privately operated prisons to safeguard prisoners' constitutional rights).

5. In this Article, the terms "prisons" and "correctional facilities" are used interchangeably to refer to jails, prisons, and detention facilities. Generally, jails are used to detain those convicted of minor offenses and those awaiting trial; prisons are used to incarcerate those convicted of more serious crimes; and detention facilities are used by the U.S. Immigration and Naturalization Service (INS) to confine illegal aliens who are to be deported. See MARTIN P. SELLERS, *THE HISTORY AND POLITICS OF PRIVATE PRISONS: A COMPARATIVE ANALYSIS* 63-64 (1993). Additionally, the U.S. Marshals Service uses detention centers to house unsentenced federal detainees. See Scott Vath, *Prison Privatization Proves a Profitable Tool for Locking up Prisoners*, AM. CITY & COUNTY, Mar. 1993, at 32D.

6. HUMAN RIGHTS WATCH, *PRISON CONDITIONS IN THE UNITED STATES* (1991).

7. *Id.* at 98 (reporting temperatures of 110°F).

practices at various INS facilities? Under current law, the Freedom of Information Act⁸ (FOIA or the Act) allows "any person" to gain access to federal agency records, subject to only nine listed exemptions.⁹ Therefore, the FOIA would provide a means for a reporter to review INS records held at the Krome Avenue Processing Center in Miami, but not records maintained at the El Centro Detention Center in El Centro, California. Why the distinction? One facility is operated by the INS,¹⁰ which, as part of the Department of Justice, is a "federal agency" under the FOIA;¹¹ the other is operated by a private contractor.¹²

This hypothetical highlights an often overlooked consequence of privatizing federal¹³ correctional facilities—reduced access by the press and public to records regarding the operation of federal prisons. To protect prisoners' rights, ensure quality care, and guard against malfeasance, private prisons must be at least as accountable to the public as public prisons.¹⁴ When contracting with the private sector to manage its correctional services, the federal government thus far has not achieved this level of accountability.¹⁵

This Article explores the limited public access to private prison records and the impact of the limitation on accountability. Part I briefly discusses the history of prison privatization, focusing on the federal experience. Part II examines how records prepared by a private contractor would be treated under current interpretations of the FOIA. Part III analyzes suggested methods to ensure accountability of prison contractors, and then concludes that Congress should pass legislation subjecting private prison records to disclosure under the FOIA.

8. 5 U.S.C. § 552 (1988).

9. *Id.* § 552(a)(3). The nine exemptions allow an agency to withhold records relating to national security, internal agency rules, matters exempted from disclosure by other federal acts, trade secrets, inter- or intra-agency memoranda, personnel and medical files, records compiled for law enforcement purposes, matters concerning the operation of financial institutions, and geological information. *Id.* § 552(b)(1)–(9).

10. HUMAN RIGHTS WATCH, *supra* note 6, at 92.

11. 5 U.S.C. § 552(f) (1988).

12. SELLERS, *supra* note 5, at 66.

13. While privatization of state correctional facilities also raises concerns under state open records acts, state law questions are beyond the scope of this Article.

14. *See infra* text accompanying notes 67–91.

15. *See infra* text accompanying notes 98–105.

I. PRIVATIZATION OF PRISONS AND THE FEDERAL EXPERIENCE

Private sector involvement in the operation of prisons has made something of a comeback in recent years. Although today incarceration often is viewed primarily as a governmental function to be undertaken by the state,¹⁶ historically, private parties have played a significant role in providing correctional services.¹⁷

Beginning in sixteenth-century England, private jailers commonly ran workhouses as profit-making institutions, where prisoners paid for their keep from the money earned by their labor.¹⁸ During the seventeenth century, England shipped convicts to the American colonies by allowing the transporting merchants to market the prisoners as indentured servants.¹⁹ In 1666, one of the first private jailers in the colonies, Raymond Stapleford, constructed a prison in Maryland in return for 10,000 pounds of tobacco and lifetime tenure as keeper of the facility.²⁰ Private entrepreneurs and reform groups continued to operate prisons in the early years of the American nation, at a time when differences between "public" and "private" were indistinct.²¹ By the eighteenth and early nineteenth centuries, however, correctional administration generally was seen as the government's responsibility, and privately operated correctional facilities gradually were replaced by government-run prisons.²²

In the years before the Civil War, private entrepreneurs began to use prisoners from public institutions as sources of cheap, involuntary labor.²³ Although the advent of the Civil

16. See, e.g., W. James Ellison, *Privatization of Corrections: A Critique and Analysis of Contemporary Views*, 17 CUMB. L. REV. 683, 696-97 (1987) ("The operation of a penal system is traditionally a state function.").

17. SELLERS, *supra* note 5, at 48-51.

18. *Id.* at 48-49.

19. DAVID N. AMMONS ET AL., *THE OPTION OF PRISON PRIVATIZATION: A GUIDE FOR COMMUNITY DELIBERATIONS* 4 (1992).

20. *Id.*

21. Samuel J. Brakel, "*Privatization*" in *Corrections: Radical Prison Chic or Mainstream Americana?*, 14 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 4 n.7 (1988).

22. AMMONS ET AL., *supra* note 19, at 4. For a discussion of the two American prison systems that developed during the nineteenth century, the Pennsylvania System and the Auburn System, see SELLERS, *supra* note 5, at 49-50.

23. See SELLERS, *supra* note 5, at 50.

War meant the end of convict leasing in parts of the South,²⁴ wartime destruction of prisons led some southern states to establish programs through which prisoners were hired out to private businesses.²⁵ During these years, some states, including Texas, Mississippi, and Louisiana, leased entire prisons to private operators.²⁶ Both approaches frequently resulted in graft, corruption, and the exploitation and maltreatment of inmates.²⁷

By the end of the nineteenth century, a number of states had prohibited contract prison labor;²⁸ however, the contracting system persisted in some states into the twentieth century.²⁹ In 1905, President Theodore Roosevelt issued an executive order forbidding the use of convict labor on federal projects.³⁰ During the early to mid-twentieth century, labor unions persuaded legislators to forbid the manufacture and sale of prison-produced items to the public.³¹ By 1960, convict-leasing programs in the states had been largely abolished, in part because of journalists who exposed the evils of the system to the public.³² In the 1970s, modest prison industry programs were viewed more as useful vocational opportunities than as significant ways to reduce prison costs.³³

Even after 1960, however, the private sector remained involved in the corrections field, albeit in limited areas such as medical and food services.³⁴ Additionally, certain "secondary" facilities, such as juvenile homes and adult halfway houses,

24. *Id.*

25. AMMONS ET AL., *supra* note 19, at 4.

26. *Id.*

27. John J. DiIulio, Jr., *The Duty to Govern: A Critical Perspective on the Private Management of Prisons and Jails*, in PRIVATE PRISONS AND THE PUBLIC INTEREST, *supra* note 2, at 155, 159–60. For example, Texas leased Huntsville prison to private entrepreneurs who sold convict labor to various businesses. Inmates were mistreated and overworked to such an extent that most did not survive more than seven years of imprisonment, some attempted suicide, and "others maimed themselves to get out of work or as a pathetic form of protest." *Id.* at 159.

28. SELLERS, *supra* note 5, at 50.

29. Brakel, *supra* note 21, at 4 n.7.

30. AMMONS ET AL., *supra* note 19, at 5.

31. See DiIulio, *supra* note 27, at 160 (stating that pressure by unions contributed to the decline of prison labor); cf. Aric Press, *The Good, the Bad, and the Ugly: Private Prisons in the 1980s*, in PRIVATE PRISONS AND THE PUBLIC INTEREST, *supra* note 2, at 19, 20–21 (discussing the passage of "state use" laws during the Great Depression, under which prisoner-produced products could be used only by the state).

32. DiIulio, *supra* note 27, at 160.

33. AMMONS ET AL., *supra* note 19, at 5.

34. Brakel, *supra* note 21, at 4–5.

historically have been managed and owned by private for-profit and non-profit groups.³⁵ For example, the federal Bureau of Prisons has been sending inmates to private pre-release community treatment centers since 1965.³⁶ Furthermore, a federal study reveals that, by 1983, forty-nine states had contracted with over 1800 private firms to manage juvenile centers accommodating approximately 31,000 youths.³⁷

Real controversy regarding prison privatization, however, did not develop until the 1980s, when private entrepreneurs began operating entire adult prisons.³⁸ Probably the most important impetus for a renewed interest in private prisons was overcrowding in the public facilities.³⁹ According to President Ronald Reagan's Commission on Privatization, the combined number of federal and state inmates increased by approximately seventy-four percent between 1979 and 1986.⁴⁰ Whereas one American per thousand was imprisoned in 1970, the rate of incarceration had tripled by 1990.⁴¹ Although federal, state, and local governments budgeted additional funds for corrections, they could not construct new prisons quickly or cheaply enough to meet the demand, in part because of continuing inflation.⁴² By 1990, federal prisons were filled to more than 170% of their rated capacity,⁴³ and forty-one states plus the District of Columbia faced court orders or consent decrees to improve crowded prison conditions.⁴⁴

At the same time that American prison systems confronted unprecedented overcrowding, state and local governments encountered fiscal pressures resulting from tax reductions, declining federal grant monies, and general economic malaise.⁴⁵

35. *Id.* at 5.

36. Ellison, *supra* note 16, at 695 n.61.

37. BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, CHILDREN IN CUSTODY: 1982/83 CENSUS OF JUVENILE DETENTION AND CORRECTIONAL FACILITIES (1983), as cited in Press, *supra* note 31, at 21. Delaware was the only state that did not utilize any private firms for juvenile care. *Id.*

38. Brakel, *supra* note 21, at 5.

39. AMMONS ET AL., *supra* note 19, at 6.

40. PRESIDENT'S COMM'N ON PRIVATIZATION, PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT 146 (1988) [hereinafter REPORT ON PRIVATIZATION].

41. AMMONS ET AL., *supra* note 19, at 6.

42. *Id.*

43. *Id.*

44. *Id.* at 3.

45. See Douglas C. McDonald, *Introduction*, in PRIVATE PRISONS AND THE PUBLIC INTEREST, *supra* note 2, at 6-7; see also SELLERS, *supra* note 5, at 14-15 (suggesting that demand for lower taxes and decreased government spending contributes to the need for increased privatization).

Although citizens demanded tougher penalties against criminals, the public was often unwilling to pay the higher taxes needed to support larger prison populations.⁴⁶ Meanwhile, in response to complaints of inadequate and costly federal programs, the Reagan administration advocated the privatization of a wide range of government services.⁴⁷ To economically strapped public officials looking for a way out of a hopeless situation, prison privatization emerged as an attractive alternative.⁴⁸

The federal correctional system afforded the first opportunity for a private entrepreneur to break into the adult prison market. In 1979, the INS began to experience overcrowding in its facilities for illegal aliens.⁴⁹ As a result, it entered into a cost-plus contract with Ted Nissen, a former California parole and corrections officer who ran a halfway house for state inmates, to utilize some of his facility's empty beds.⁵⁰ When the shortage of federal beds for detainees continued, Nissen started a for-profit private prison company known as Behavioral Systems Southwest.⁵¹ By 1990, Behavioral Systems Southwest operated several INS detention facilities and managed a number of community treatment centers for the U.S. Bureau of Prisons.⁵² At that time, the INS was contracting with at least three other private firms to operate detention centers.⁵³

Not surprisingly, the federal government began experimenting with privatization at what has been termed the "shallow end" of the adult corrections system.⁵⁴ Incarcerated only briefly while awaiting deportation, illegal aliens generally are considered low-security risks who receive little in the

46. Cikins, *supra* note 3, at 445-46.

47. REPORT ON PRIVATIZATION, *supra* note 40, at xi; McDonald, *supra* note 45, at 4.

48. Cikins, *supra* note 3, at 446. See generally E.S. Savas, *It's Time to Privatize*, 19 FORDHAM URB. L.J. 781 (1992) (advocating that privatization of a city government's services would result in improved and less expensive public services, lower taxes, and more efficient government).

49. Press, *supra* note 31, at 25.

50. *Id.*

51. *Id.*

52. LOGAN, *supra* note 3, at 21-22.

53. For a sample list of privately contracted prison facilities, including INS and Bureau of Prison detention centers, see SELLERS, *supra* note 5, at 65-68.

54. MICK RYAN & TONY WARD, *PRIVATIZATION AND THE PENAL SYSTEM: THE AMERICAN EXPERIENCE AND THE DEBATE IN BRITAIN* 27-28 (1989) (describing "shallow end" as low-security correctional institutions such as juvenile detention facilities and adult halfway houses).

way of counseling or rehabilitation.⁵⁵ Another type of federal facility requiring minimum security care, the Bureau of Prisons' pre-release community treatment centers, has been operated exclusively by private firms since 1981.⁵⁶

Following the federal example, many state governments began to contract with private firms to manage their prisons in the 1980s. In 1986, the Marion Adjustment Center in St. Mary's, Kentucky, became the first state prison in modern times to be privately owned and operated.⁵⁷ Statistics prepared by the University of Florida's Center for Studies in Criminology and Law showed that by 1991, private entrepreneurs were running forty-three adult prisons in fourteen states, totalling 15,232 beds.⁵⁸ According to Corrections Corporation of America (CCA), a leading private correctional firm, by 1993 twenty private companies managed more than 30,000 beds, representing two percent of the total U.S. prison and jail population.⁵⁹ CCA itself operated nineteen prisons nationwide in 1993,⁶⁰ and by 1994 CCA had contracted to build and manage facilities in Arizona, Florida, and Puerto Rico.⁶¹

By contracting for corrections services, both state and federal government officials hope to: (1) reduce prison construction and operating costs, including the labor expenses associated with pensions and benefits; (2) build prison facilities more quickly and with fewer bureaucratic delays; and (3) enhance flexibility in inmate care without the encumbrance of governmental red tape.⁶² Opponents of privatization, however, contend that: (1) private prisons may cost more than public facilities because

55. *Id.* at 13.

56. *Hearings on Privatization of Corrections Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 99th Cong., 1st and 2d Sess. 132 (1986) (statement of Norman A. Carlson, Director of the Bureau of Prisons).

57. LOGAN, *supra* note 3, at 24. Also in 1986, Corrections Corporation of America (CCA) unsuccessfully attempted to take over Tennessee's entire prison system. McDonald, *supra* note 45, at 1. For a complete discussion of CCA's proposal, see David H. Folz & John M. Scheb, II, *Prisons, Profits and Politics: The Tennessee Privatization Experiment*, 73 JUDICATURE 98 (1989).

58. AMMONS ET AL., *supra* note 19, at 26.

59. CORRECTIONS CORP. OF AMERICA, 1993 ANNUAL REPORT 8 (1994) [hereinafter CCA ANNUAL REPORT] (on file with the *University of Michigan Journal of Law Reform*).

60. *Id.* at 15.

61. CORRECTIONS CORP. OF AMERICA, 1994 FIRST QUARTER REPORT (1994) (on file with the *University of Michigan Journal of Law Reform*).

62. SELLERS, *supra* note 5, at 41. For a comprehensive list of the arguments both for and against prison privatization, see LOGAN, *supra* note 3, at 40-48.

of hidden costs;⁶³ (2) quality and quantity of prison services may decline because of economic pressures to cut corners; and (3) by relying on private operators, the government may have no means to provide prison services in the event of labor strikes, operator bankruptcies, or other emergencies.⁶⁴ Additional criticisms of private prisons include political arguments, such as the impropriety of using privatization to circumvent voters who fail to support prison bond referenda,⁶⁵ and social arguments, such as the claim that private prisons weaken the authority of the state in the eyes of both the inmates and the public.⁶⁶

Most of the social and political issues surrounding prison privatization demonstrate the need for accountability. Critics of what have been called "prisons for profit"⁶⁷ fear that without adequate standards of accountability, private prison operators will have free rein to cut corners and increase their profit

63. E.g., Joseph E. Field, Note, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649, 654-55 (1987) (naming additional contract monitoring and legal fees as examples). Some studies addressing whether private prisons are cheaper to run than public prisons have generated inconclusive results. See, e.g., DiIulio, *supra* note 27, at 156 (stating that no reliable cost data exist comparing public and private correctional facilities); Dale K. Sechrest & David Shichor, *Corrections Goes Public (and Private) in California*, FED. PROBATION, Sept. 1993, at 3, 7 (concluding that results of a cost effectiveness study did not favor either privately or publicly operated prisons); cf. LOGAN, *supra* note 3, at 96 (noting that simple cost comparisons of public and private prisons may yield inaccurate results because they neglect such diversifying factors as location, size, and age of the facilities).

Other research supports the proposition that private prisons are more cost-effective than those operated by the state. AMMONS ET AL., *supra* note 19, at 19-20 (citing reports by the National Institute of Justice and the Urban Institute). For example, Martin Sellers compared three public prisons with three private facilities, each similar in size, location, structure, age, inmate capacity, average daily occupancy, and management style. Additionally, each pair of institutions offered the same quantity and type of prison services. Sellers concluded, after identifying as many hidden costs as possible, that the private prisons were operated more cost effectively than were the public facilities. SELLERS, *supra* note 5, at 70-93.

Both supporters and opponents of privatization are awaiting the results of an experiment currently underway in Louisiana. That state has constructed three identical correctional centers, one of which will be managed by CCA, one by Wackenhut Corrections Corporation, and the third by the state. AMMONS ET AL., *supra* note 19, at 34. Because of the similarities among the three facilities, comparative analysis of the costs and quality of care afforded by them should provide more accurate data regarding the costs of privatization than do surveys comparing facilities with many distinguishing characteristics.

64. LOGAN, *supra* note 3, at 45-48.

65. SELLERS, *supra* note 5, at 51.

66. Ira P. Robbins, *The Impact of the Delegation Doctrine on Prison Privatization*, 35 UCLA L. REV. 911, 952 (1988).

67. See, e.g., *id.* at 912 & n.2.

margins by reducing the quantity or quality of services provided to prisoners.⁶⁸ When faced with the need to improve the bottom line, private entrepreneurs might reduce staff or stint on personnel training to the detriment of prisoners.⁶⁹ Unless the government implements some form of monitoring system, it will be unable to discover or deter these types of unsavory practices.⁷⁰

A related concern involves what Martin Sellers has termed the "feather their nest" syndrome.⁷¹ Private contractors need many convicts to maintain profitability and to expand prison operations.⁷² To preserve their inmate populations, these entrepreneurs could resort to unethical or unjust policies to prolong prison sentences and keep prisoners from being released on probation.⁷³ Even if the state discovers such unscrupulous contractors, critics still fear that private prison companies will buy off public officials with bribes, payoffs, and kickbacks.⁷⁴

Compounding these risks of opportunism among private contractors and increasing the difficulties associated with accountability is the nature of the prison setting itself. Although taxpayers pay for correctional services, most taxpayers do not sample the wares, whether furnished by the state or a

68. SELLERS, *supra* note 5, at 52.

69. Keating, *supra* note 3, at 131. According to this view, privatization achieves most of its touted financial economies by reducing labor costs—a form of union busting that results in fewer and less professional prison workers. Craig Becker, *With Whose Hands: Privatization, Public Employment, and Democracy*, 6 YALE L. & POL'Y REV. 88, 91 (1988). Not surprisingly, the presidents of the American Federation of Government Employees and the American Federation of State, County, and Municipal Employees both oppose prison privatization. SELLERS, *supra* note 5, at 59.

70. Robbins, *supra* note 2, at 724–25.

71. SELLERS, *supra* note 5, at 51.

72. Most contracts for prison management provide contractors with a per diem rate for each inmate incarcerated in the facility. Herman B. Leonard, *Private Time: The Political Economy of Private Prison Finance*, in PRIVATE PRISONS AND THE PUBLIC INTEREST, *supra* note 2, at 66, 79.

73. SELLERS, *supra* note 5, at 58. As described by Professor Logan:

Will the cost-calculating warden revoke a prisoner's good time to gain a little "extra" per diem revenue? Or will he bribe inmates with liberal grants of good time credit in order to buy their cooperation and to avoid the expense of the extra paperwork required by disciplinary proceedings? Or will he decide that it is least costly in the long run to govern firmly but fairly and consistently?

LOGAN, *supra* note 3, at 69.

74. SELLERS, *supra* note 5, at 59.

private entity.⁷⁵ Only prisoners are in a position to judge the quality and sufficiency of the services provided, and prisoners are neither the most visible nor the most articulate group in society.⁷⁶ This "hidden delivery"⁷⁷ problem is exacerbated by the fact that average citizens care little about the plight of convicts and are unlikely to exert pressure to ensure that prisoners receive quality care.⁷⁸

While not discounting the need for accountability, Professor Charles Logan, a supporter of privatized corrections, argues that both public and private prisons should be subject to the same standards and supervision.⁷⁹ By contracting out for correctional services, the state does not deny ultimate responsibility for production of those services. Instead, the state merely chooses to administer its responsibility through private, rather than public, employees.⁸⁰ Both government workers and private contractors may act dishonestly or unethically, and both public and private prisons are secluded from the community.⁸¹ Accordingly, prisons should be monitored and ultimately subjected to disclosure whether they are run by the state or the private sector.⁸² Professor Logan concedes, however, that both private contractors and the government may try to escape responsibility for abuses by blaming each other.⁸³

Some proponents of privatization go one step further, asserting that private contractors already may be *more* accountable legally, economically, politically, and socially.⁸⁴ According to this argument, private prison companies are subject to

75. Becker, *supra* note 69, at 105.

76. *Id.*

77. James T. Gentry, Note, *The Panopticon Revisited: The Problem of Monitoring Private Prisons*, 96 YALE L.J. 353, 356 (1986) (defining "hidden delivery" as a market failure occurring when a purchaser of goods or services does not observe consumption and thus "cannot accurately gauge the quantity and quality of the product").

78. DiIulio, *supra* note 27, at 164.

79. LOGAN, *supra* note 3, at 210.

80. *See id.* at 50-52.

81. *See id.* at 55-57, 194.

82. *Id.* at 204.

83. *Id.* at 194-95; *see, e.g.*, Martin Tolchin, *Jails Run by Private Company Force it to Face Question of Accountability*, N.Y. TIMES, Feb. 19, 1985, at A15. In that article, Tolchin quotes the Reverend Roberto Flores of the Houston Center for Immigration as saying: "[W]henever we have a problem, [the] I.N.S. tells us to go to [the private contractor], and [the private contractor] tells us to go to [the] I.N.S." *Id.*

84. LOGAN, *supra* note 3, at 195-202; *see also* AMMONS ET AL., *supra* note 19, at 14-15 ("Not only are private sector operators monitored by the courts and government agencies, they also are scrutinized by the media, civil rights groups, and prison reform activists.").

marketplace checks that do not exist in the public sector.⁸⁵ The relative novelty and controversial nature of private prisons has drawn media attention, increasing the overall visibility of corrections in the public eye.⁸⁶ Additionally, most government contracts for prison operations mandate some type of government supervision, such as the use of on-site, state-employed monitors.⁸⁷ Although Professor Logan agrees that prison contracts should include provisions requiring some sort of monitoring system,⁸⁸ he decries proposals such as that of Professor Ira Robbins⁸⁹ for imposing "double standards" on private and public prisons in the name of accountability.⁹⁰ Professor Logan finds it unfair to saddle private prison operators with expensive monitoring requirements "far beyond those that exist for government prisons."⁹¹

Privatization of corrections presents a host of legal issues, including questions regarding the government's authority to delegate its penal function to private entities.⁹² Critics of private prisons have found constitutional obstacles to such delegations because the power to incarcerate implicates the due process rights of prisoners.⁹³ Supporters of privatization, however, argue that the government achieves its penological objectives through private corporations legitimately and con-

85. AMMONS ET AL., *supra* note 19, at 14. Marketplace checks include economic competition for lucrative prison contracts, the threat of contract termination or nonrenewal for poor performance, and independent assessments of risk or mismanagement by investment counselors, shareholders, and liability insurers. LOGAN, *supra* note 3, at 197.

86. LOGAN, *supra* note 3, at 202-03.

87. *Id.* at 206.

88. *Id.* at 65. Logan suggests that these monitors should review contractors' "discretionary decisions" regarding complaints of unfair treatment filed by inmates. *Id.*

89. In 1988, the American Bar Association issued a report prepared by Professor Robbins that recommended model legislation and a model contract to guide jurisdictions desiring prison privatization. *See generally* Robbins, *supra* note 2, at 612-794 (providing model contract and statute provisions and detailed commentary regarding prison privatization, from financial and physical plant issues to questions of inmate management, use of force, indemnification, and government monitoring).

90. LOGAN, *supra* note 3, at 146-47.

91. *Id.* at 147.

92. *See, e.g.*, Robbins, *supra* note 66, at 950 (concluding that courts may find government delegations of prison management unconstitutional when disciplinary rules are formulated by private parties); *cf.* Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449, 502 n.250 (1988) (predicting that courts will not be persuaded that delegation of prison management to private parties is unconstitutional absent specific allegations of abuse).

93. *See, e.g.*, Field, *supra* note 63, at 673-74 (arguing that as a matter of fairness and equity, only the government should "limit people's freedom").

stitutionally so long as it retains ultimate authority over the delegation.⁹⁴ Although no court has addressed this issue directly, some commentators find *Medina v. O'Neill*⁹⁵ significant.⁹⁶ In this case, a federal court had an opportunity to find private incarceration unconstitutional and did not do so.⁹⁷

To resolve the delegation question at the state level, many state legislatures have passed laws authorizing private incarceration.⁹⁸ Less clear, however, is whether the federal government needs or already has similar statutory authority. No comprehensive federal enabling legislation exists as such. By not adopting such legislation, Congress has overlooked an important opportunity to impose accountability standards on federal correctional agencies.

While no comprehensive federal statute exists, some observers believe privatization of federal incarceration is provided by 18 U.S.C. § 3621(b).⁹⁹ Norman Carlson, the former Director of the Federal Bureau of Prisons, argues that this section gives the federal government the authority to privatize its prisons.¹⁰⁰ Section 3621(b) provides that the Bureau of

94. *E.g.*, LOGAN, *supra* note 3, at 60; Ellison, *supra* note 16, at 693.

95. 589 F. Supp. 1028 (S.D. Tex. 1984), *vacated in part, rev'd in part on other grounds*, 838 F.2d 800 (5th Cir. 1988). In *Medina*, a federal district court found that the INS was liable under a "state action" theory for the behavior of a private party hired by the INS to detain Colombian stowaways. 589 F. Supp. at 1038. For an analysis of the state action doctrine in the private prison context, see Robbins, *supra* note 2, at 577-604.

Questions concerning the availability of qualified immunity to private prison personnel for violations of prisoners' civil rights are discussed at length in Charles W. Thomas, *Resolving the Problem of Qualified Immunity for Private Defendants in Section 1983 and Bivens Damage Suits*, 53 LA. L. REV. 449 (1992).

96. See Douglas C. McDonald, *When Government Fails: Going Private as a Last Resort*, in PRIVATE PRISONS AND THE PUBLIC INTEREST, *supra* note 2, at 179, 181 (commenting on judges foregoing the opportunity to address the constitutionality of prison privatization). *But cf.* SELLERS, *supra* note 5, at 55 (construing *Medina* as granting the INS a constitutional right to contract with private parties to detain excludable aliens).

97. *Medina*, 589 F. Supp. at 1038.

98. *E.g.*, TEX. GOV'T CODE ANN. § 495.001 (West Supp. 1995) (authorizing the Texas Board of Corrections to "contract with a private vendor . . . for the financing, construction, operation, maintenance, or management of a secure correctional facility"). For a partial list of state enabling statutes, see Robbins, *supra* note 2, at 768-71.

99. 18 U.S.C. § 3621(b) (1988 & Supp. V 1993) (amending 18 U.S.C. § 4082(b) (1982)).

100. Norman A. Carlson, *Prison Privatization*, 17 CORRECTIONS DIG. 3 (1986). Carlson discusses 18 U.S.C. § 4082(b) (1982), which was the precursor of § 3621(b). The operative language has not changed. Compare 18 U.S.C. § 4082(b) (1982) with 18 U.S.C. § 3621(b) (1988 & Supp. V 1993). The current statute states:

Prisons may designate as a place of confinement any appropriate facility "whether maintained by the Federal Government *or otherwise*."¹⁰¹ Under Carlson's view, this language acknowledges the federal government's power to delegate prison maintenance to private entities.¹⁰² At least one commentator maintains, however, that Congress intended the "or otherwise" clause merely to permit federal offenders to be placed in state facilities.¹⁰³ After examining the legislative history, purpose, and context of the statute, Professor Robbins concludes that the statute allows the Bureau of Prisons to contract with private entities only for the operation of pre-release residential community treatment centers.¹⁰⁴ According to this view, the federal government lacks the necessary statutory authority to privatize other types of incarceration facilities.¹⁰⁵

Uncertainty surrounding the legal implications of prison privatization led the American Bar Association in 1986 to adopt a resolution advising jurisdictions not to contract with the private sector for prison management services "until the complex constitutional, statutory, and contractual issues are developed and resolved."¹⁰⁶ Despite these complicated issues, however, prison privatization continues to gain momentum on both the federal and state level.¹⁰⁷

Continued growth in prison privatization can hardly be surprising, considering that the factors that prompted public officials to privatize during the 1980s have become more

The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government *or otherwise* and whether within or without the judicial district in which the person was convicted . . .

Id. § 3621(b) (emphasis added) The only difference between the current provision and § 4082(b) is that the earlier provision requires the Attorney General, not the Bureau of Prisons, to designate the place of confinement. 18 U.S.C. § 4082(b) (1982).

101. 18 U.S.C. § 3621(b) (emphasis added).

102. Carlson, *supra* note 100, at 1-5.

103. Field, *supra* note 63, at 667-68.

104. Robbins, *supra* note 2, at 767.

105. *Id.*

106. SECTION OF CRIMINAL JUSTICE, AMERICAN BAR ASSOCIATION, REPORT TO THE HOUSE OF DELEGATES, Report 111B at 1 (1986).

107. Prison privatization has been called a "nationwide trend" by some members of the press. *E.g.*, Linda Kleindienst, *Florida Adds Privatized Prisons*, ORLANDO SENTINEL, Mar. 8, 1994, at C1.

pressing. Prison populations, once expected to ease in this decade, have swelled.¹⁰⁸ Public sentiment continues to favor longer sentences for criminals and disapprove of early release programs.¹⁰⁹ Current prison facilities continue to age and become outdated, necessitating new construction.¹¹⁰ Although leaders may have abandoned Reagan era privatization, they continue to endorse the concept, while calling for "less government management and more government leadership."¹¹¹

Private corrections firms see a lucrative opportunity in these attitudes and statistics.¹¹² The Bureau of Prisons maintains that it has the necessary authority to contract with private firms for correctional services.¹¹³ Recently, the U.S. Marshals Service has followed the Bureau of Prison's lead; in 1990, it contracted with CCA to manage a maximum-security detention center in Leavenworth, Kansas.¹¹⁴ CCA began operating the 256-bed institution in June 1992.¹¹⁵

As private correctional facilities proliferate, we must remember past abuse. Inevitably, the legal questions of unauthorized delegation, statutory authority, and due process surrounding prison privatization circle back to the problem of accountability. Only safeguards in the form of government standards and supervision will ensure ultimate control of

108. McDonald, *supra* note 45, at 8. The number of felons housed in federal prisons has grown from 24,500 in 1980 to 76,000 in 1993. By 1993, private facilities held an additional 8200 convicts. Penny Bender, *Crowded Prisons Blamed on Sentencing Guidelines*, Gannett News Service, May 12, 1993, at *2, available in LEXIS, Nexis Library, Mags File. The Bureau of Prisons has estimated that by 1999 the federal system will accommodate 116,000 people. *Id.* The average number of prisoners handled daily by the U.S. Marshals Service has multiplied from 5383 in 1984 to 20,084 in 1993. Vath, *supra* note 5, at 33.

109. LOGAN, *supra* note 3, at 236; see also Vath, *supra* note 5, at 32D ("As citizens repeatedly call for locking up more criminals and returning the streets to law-abiding people, . . . [p]olitical leaders are feeling the heat about early release programs that are intended to ease prison overcrowding.")

110. See McDonald, *supra* note 45, at 5-6 (reporting that only 21% of federal prisons satisfy the Commission on Accreditation for Corrections standards). Although Congress has approved funding for 50,000 additional prison beds, this figure hardly accommodates demand. Bender, *supra* note 108, at *2.

111. Paul R. Verkuil, *Reverse Yardstick Competition: A New Deal for the Nineties*, 45 FLA. L. REV. 1, 6 (1993).

112. See, e.g., CCA ANNUAL REPORT, *supra* note 59, at 4 ("We intend to pursue every opportunity that makes economic sense.")

113. AMMONS ET AL., *supra* note 19, at 35 n.11.

114. *Id.* at 19; Vath, *supra* note 5, at 32D.

115. CORRECTIONS CORP. OF AMERICA, FACILITY PROFILES 6 (1994) [hereinafter CCA FACILITY PROFILES] (on file with the *University of Michigan Journal of Law Reform*).

privatized facilities and protection of inmates' liberty interests. Commentators note that adequate monitoring of private prisons will resolve much of the doubt concerning their propriety.¹¹⁶ Even Professor Robbins admits that private prisons may be constitutional "if the government properly oversees, reviews, and circumscribes the private company's authority."¹¹⁷

Many monitoring systems have been proposed to ensure that private prisons are as accountable to the public as are publicly operated prisons.¹¹⁸ Accountability cannot be achieved, however, without clear standards. In the federal context, where no enabling legislation specifically authorizes private prisons to create performance criteria,¹¹⁹ correctional agencies are free to create performance criteria for private operators.

Without predictable legislative standards, the public has been effectively shut out of the privatization process. Without public awareness, public input regarding the operation of private prisons is inadequate. But does the public have equal access to information concerning public and private federal prisons? To answer that question, it is necessary to consider how the FOIA applies to public prisons and to determine whether it is relevant to privatized facilities.

II. FEDERAL PRIVATE PRISONS AND THE FOIA

Congress passed the FOIA¹²⁰ in 1966¹²¹ as a bipartisan effort to open the workings of government to the public.¹²² As the many administrative agencies created during this century took over large areas of government responsibility,¹²³ it became

116. See, e.g., Gentry, *supra* note 77, at 358-59.

117. Robbins, *supra* note 66, at 915.

118. See *infra* text accompanying notes 394-99.

119. See *supra* text accompanying notes 98-105.

120. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (1988)).

121. Although the FOIA was signed into law on July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250 (1966), the legislation did not take effect until one year later. Pub. L. No. 90-23, § 4, 81 Stat. 54 (1967) (amending the FOIA) (codified as amended at 5 U.S.C. § 552 (1988)).

122. KENT R. MIDDLETON & BILL F. CHAMBERLIN, *THE LAW OF PUBLIC COMMUNICATIONS* 455 (3d ed. 1994).

123. See HAROLD L. CROSS, *THE PEOPLE'S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS* 223 (1953) ("Nearly every phase of our lives and business is affected in some way, directly or indirectly, visibly or invisibly, to a greater or lesser degree by a maze of federal administrative regulations.").

more difficult for citizens to find out "what their government [was] up to."¹²⁴ Although the public records section of the Administrative Procedure Act¹²⁵ (APA) was intended to make government records accessible, a 1953 study by Professor Harold Cross concluded that the government has used that provision's vague wording as authority for withholding records from the press.¹²⁶

Congress amended the APA with the FOIA to remedy this problem; the FOIA established a policy of "disclosure, not secrecy"¹²⁷ with respect to federal agency records. When signing the FOIA into law, President Lyndon Johnson emphasized the importance of an accessible government:

This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest.¹²⁸

Government accountability to the public, then, lies at the heart of the FOIA. The Act's legislative history makes clear that Congress had at least two goals in mind when envisioning the FOIA: first, to provide the electorate with the necessary information to make informed choices about public policy;¹²⁹

124. *EPA v. Mink*, 410 U.S. 73, 105 (1973) (Douglas, J. dissenting) (quoting Henry Steele Commager, *The Defeat of America*, N.Y. REV. OF BOOKS, Oct. 5, 1972, at 7).

125. Administrative Procedure Act, ch. 324, § 3, 60 Stat. 237, 238 (codified at 5 U.S.C. § 552 (1988)).

126. See CROSS, *supra* note 123, at 227-28. For examples of government agencies that used the APA to withhold information from the public, see H.R. REP. NO. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2422.

127. *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976).

128. Statement by the President Upon Signing Bill Revising Public Information Provisions of the Administrative Procedure Act, July 4, 1966, 2 WEEKLY COMP. PRES. DOC. 895 (July 11, 1966).

129. See, e.g., H.R. REP. NO. 1497, 89th Cong., 2d Sess. 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2418, 2429:

A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. A danger signal to our democratic society in the United States is the fact that such a political truism needs repeating. And repeated it is, in textbooks and classrooms, in newspapers and broadcasts.

The repetition is necessary because the ideals of our democratic society have outpaced the machinery which makes that society work. The needs of the electorate have outpaced the laws which guarantee public access to the facts in Government.

and second, "to protect the American public from the evils of secret government."¹³⁰ Permeating both goals is the belief that public scrutiny of government activity will promote bureaucratic accountability.¹³¹ Recognizing the value of public access to federal agency records, Justice Powell opined that the FOIA's purpose is "to ensure an informed citizenry, vital to the functioning of a democratic society, . . . to check against corruption and to hold the governors accountable to the governed."¹³²

The FOIA seeks to preserve government accountability by requiring federal agencies¹³³ to provide three types of information to the public. First, agencies must publish in the Federal Register basic data, such as descriptions of agency organization, explanations of FOIA procedures, and lists of persons to contact with FOIA requests.¹³⁴ Second, agencies must allow the public to inspect and copy "reading room" materials,¹³⁵ such as final opinions in adjudicated cases, specific policy statements, and certain administrative staff manuals.¹³⁶ Third, and most importantly, agencies must make available to "any person" all other records that are properly requested, reasonably described, and not otherwise exempt from disclosure.¹³⁷

Upon receipt of a formal FOIA request, an agency can either disclose the relevant records or justify nondisclosure with one of nine statutory exemptions.¹³⁸ Because the FOIA's purpose

Id. For a detailed analysis and history of the FOIA, see Kenneth C. Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967); Jim Smith, *The Freedom of Information Act of 1966: A Legislative History Analysis*, 74 LAW LIBR. J. 231 (1981).

130. 112 CONG. REC. 13,660 (1966) (statement of Rep. Matsunaga).

131. See *supra* notes 129-30.

132. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (citations omitted).

133. For the meaning of "federal agency," see *infra* Part II.A.1.

134. 5 U.S.C. § 552(a)(1) (1988).

135. OFFICE OF INFORMATION & PRIVACY, U.S. DEPT OF JUSTICE, FREEDOM OF INFORMATION ACT GUIDE & PRIVACY ACT OVERVIEW 5 (Pamela Maida ed., Sept. 1994) [hereinafter FOIA OVERVIEW].

136. 5 U.S.C. § 552(a)(2) (1988).

137. *Id.* § 552(a)(3). The agency's disclosure determination must be made without regard to the requester's identity or intended use of the information. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975) ("[R]ights under the Act are neither increased nor decreased by reason of the fact that [the requester] claims an interest . . . greater than that shared by the average member of the public.").

138. These exemptions allow agencies to withhold records that pertain to national security, internal agency rules, matters exempted from disclosure by other federal

is to "open agency action to the light of public scrutiny,"¹³⁹ the Supreme Court has recognized that FOIA exemptions must be "narrowly construed."¹⁴⁰ Even records that fall within one of these exemptions may be disclosed at the agency's discretion, unless such disclosure is prohibited by other law.¹⁴¹

With respect to federal prisons, the FOIA clearly applies to cabinet offices such as the Department of Justice and to the agencies that report to it, including the Bureau of Prisons, the INS, and the U.S. Marshals Service.¹⁴² The last three agencies are considered "components" of the Department of Justice,¹⁴³ and as such are governed by the Department's FOIA guidelines.¹⁴⁴ Each of these agencies has been involved in FOIA litigation.¹⁴⁵

This Article considers whether the FOIA applies to federal prison records once those prisons are under private management. Two inquiries are involved in deciding whether these records will be subject to the FOIA. First, it must be determined whether a private organization operating a federal prison is a federal "agency" under the FOIA. If the private entity is not considered a federal agency under the FOIA, the

statutes, trade secrets and confidential commercial information, inter- or intra-agency memoranda, personnel and medical files, law enforcement information, matters concerning the operation of financial institutions, and geological information. 5 U.S.C. § 552(b)(1)-(9) (1988).

139. *Rose*, 425 U.S. at 372 (citation omitted).

140. *United States Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988) (citations omitted).

141. *Chrysler Corp. v. Brown*, 441 U.S. 281, 293-94 (1979) (holding that FOIA exemptions permit, but do not require, a federal agency to withhold records). For an example of a statute that prohibits disclosure, see the Trade Secrets Act, 18 U.S.C. § 905 (Supp. V 1993), which forbids agency personnel from disclosing certain kinds of confidential information.

142. 5 U.S.C. § 552(f) (defining "agency" to include "any executive department . . . or other establishment in the executive branch").

143. 28 C.F.R. § 16.1(b)(3), app. I (1994).

144. 28 C.F.R. § 16 (1994). The INS has published additional FOIA guidelines. 8 C.F.R. § 103.8 (1994).

145. *See, e.g., United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989) (stating that the FOIA requires the Department of Justice to disclose district court decisions it receives in the course of litigating tax cases); *Powell v. United States Bureau of Prisons*, 927 F.2d 1239 (D.C. Cir. 1991) (remanding for further consideration a prisoner's FOIA request for disclosure of the "Central Inmate Monitoring Manual"); *Lawyer's Comm. for Human Rights v. INS*, 721 F. Supp. 552 (S.D.N.Y. 1989) (noting that the court would review documents in camera to decide whether the INS was justified in claiming FOIA exemptions); *Heller v. United States Marshals Serv.*, 655 F. Supp. 1088 (D.D.C. 1987) (ruling that documents sought from the U.S. Marshals Service were exempt under the FOIA).

question becomes whether the records of that organization nevertheless could be considered "agency records."

A. Does a Private Organization Operating a Federal Prison Constitute a Federal "Agency" for the Purposes of the FOIA?

1. *Defining a FOIA Agency*—By its terms, the FOIA only applies to federal "agencies."¹⁴⁶ Because the FOIA originally did not define "agency,"¹⁴⁷ courts were left to apply the APA's definition to FOIA actions.¹⁴⁸ Under the APA, "agency" means "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," not including Congress or the courts.¹⁴⁹

In interpreting the APA's definition of agency, the Court of Appeals for the District of Columbia Circuit in *Soucie v. David*¹⁵⁰ premised agency status upon an entity's power to act independently in a specific area.¹⁵¹ In that case, the court found that the Office of Science and Technology (OST), a congressionally established unit within the Executive Office of the President, constituted a federal agency because it independently evaluated federal programs.¹⁵² According to the court, "the APA apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions."¹⁵³

Four years later, in *Washington Research Project, Inc. v. Department of Health, Education, and Welfare*,¹⁵⁴ the District of Columbia Circuit narrowed the *Soucie* test to one of inde-

146. 5 U.S.C. § 552 (1988).

147. Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (amending the Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946)). The FOIA was enacted as an amendment to the APA. *Id.*

148. *See, e.g.,* *Washington Research Project, Inc. v. Department of Health, Educ. & Welfare*, 504 F.2d 238, 245-46 (D.C. Cir. 1974) (discussing the APA's definition of agency), *cert. denied*, 421 U.S. 963 (1975); *Soucie v. David*, 448 F.2d 1067, 1072-76 (D.C. Cir. 1971) (holding that the Office of Science and Technology (OST) is an agency under the APA and not merely staff to the President).

149. 5 U.S.C. § 551(1) (1988). Congress and the courts are expressly excluded from the APA definition of agency. *Id.* § 551(1)(A)-(B).

150. 448 F.2d 1067 (D.C. Cir. 1971).

151. *Id.* at 1073.

152. *Id.* at 1075. The court was also influenced by the fact that the OST published FOIA guidelines in the Federal Register. *Id.*

153. *Id.* at 1073.

154. 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

pendent decision-making authority.¹⁵⁵ The court held that initial review groups (IRGs) comprised of nongovernmental consultants hired by the National Institute of Mental Health were advisory committees performing staff functions and not agencies under the FOIA.¹⁵⁶ The institute used the IRGs to evaluate grant applications for scientific research projects, and usually followed the IRGs' recommendations with only perfunctory review.¹⁵⁷ Despite the pivotal advisory role played by the IRGs in the decision-making process, the court determined that the IRGs had not become the "functional equivalent" of the government institute because they were not "making its decisions for it."¹⁵⁸ The decisive factor identified by the court in resolving whether an entity is an agency subject to the FOIA was "whether [the entity] has any authority in law to make decisions."¹⁵⁹

In 1974, Congress amended the FOIA to add the following language to the APA definition of "agency":

For purposes of this section, the term 'agency' . . . includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.¹⁶⁰

According to the Committee on Government Operations's report on the proposed amendment to the FOIA, the definition was enlarged to include entities "which perform governmental functions and control information of interest to the public."¹⁶¹ The Committee's report further explains that the definition was not intended to include "corporations which receive appro-

155. 504 F.2d at 248.

156. *Id.* at 246.

157. *Id.* at 248.

158. *Id.*

159. *Id.* at 248 (emphasis added). One commentator notes that the *Washington Research* court in effect ruled that an entity cannot become the equivalent of an agency unless that entity has statutory authority to make decisions for the agency. See Anne H. Wright, Note, *The Definition of "Agency" Under the Freedom of Information Act as Applied to Federal Consultants and Grantees*, 69 GEO. L.J. 1223, 1240 (1981).

160. Amendments to the Freedom of Information Act, Pub. L. No. 93-502, § 3(e), 88 Stat. 1561, 1564 (codified at 5 U.S.C. § 552(f) (1988)).

161. H.R. REP. NO. 876, 93d Cong., 2d Sess. 8 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6274.

priated funds but are neither chartered by the Federal Government nor controlled by it."¹⁶²

Despite the "governmental function" language in the definition's legislative history,¹⁶³ litigation addressing when private organizations become agencies for FOIA purposes has focused not on the function performed by the organization, but rather on the extent of government control over the entity. In *Forsham v. Harris*,¹⁶⁴ the leading case, the Supreme Court held that a private organization will constitute a federal agency subject to the FOIA only if it is subject to extensive, day-to-day control by the government.¹⁶⁵

In *Forsham*, the Court held that a privately operated organization receiving federal grants to perform medical research was not a federal agency and, therefore, its research data were not accessible under the FOIA.¹⁶⁶ The research, which resulted in proceedings by the Secretary of Health, Education, and Welfare (HEW) and the Food and Drug Administration (FDA) to restrict the labeling and use of certain drugs in diabetes treatment, was funded solely through grants awarded by the National Institute of Arthritis, Metabolism, and Digestive Diseases (NIAMDD), a subdivision of HEW.¹⁶⁷ Patient records and raw data generated by the grantee remained in the private organization's possession.¹⁶⁸ The NIAMDD, however, retained the right to access these records under the grant agreement, though it did not

162. S. CONF. REP. NO. 1200, 93d Cong., 2d Sess. 14-15 (1974), *reprinted in* 1974 U.S.C.A.N. 6285, 6293.

163. For a discussion of the legislative history behind the FOIA definition of "agency," see *Irwin Memorial Blood Bank of the San Francisco Medical Soc'y v. American Nat'l Red Cross*, 640 F.2d 1051, 1052-54 (9th Cir. 1981).

164. 445 U.S. 169 (1980).

165. *Id.* at 180 & n.11.

166. *Id.* at 171. Because the *Forsham* appellants did not raise the question of whether the grantee was an agency, but rather argued that the data gathered by the grantee were "agency records," it has been suggested that the Court's discussion of what constitutes an agency for FOIA purposes is dicta. Wright, *supra* note 159, at 1235 n.78. However, this analysis overlooks the Court's reasoning that agency records are usually created by federal agencies. Although the Court admitted that records of a nonagency could become agency records, 445 U.S. at 181, it concluded that in this instance, "Congress excluded private grantees from FOIA disclosure obligations by excluding them from the definition of 'agency'." *Id.* at 179. Therefore, the Court's determination that this grantee did not qualify as a federal agency was instrumental to its holding that the data were not agency records.

167. *Forsham*, 445 U.S. at 171-72.

168. *Id.* at 173.

exercise this right.¹⁶⁹ The government could even request permanent custody of the data but chose not to do so.¹⁷⁰

The Court noted that although the NIAMDD supervised the research by conducting on-site visits and requiring periodic reports, the "day-to-day administration of grant-supported activities" remained in the discretion of the grantee.¹⁷¹ Notwithstanding that the study was financed entirely with federal funds and monitored by the NIAMDD to ensure compliance with the grant requirements, the Court determined that "[t]he funding and supervision indicated by the facts of this case are consistent with the usual grantor-grantee relationship and do not suggest the requisite magnitude of Government control."¹⁷²

In reaching its decision, the Court looked to the meaning of "federal agency" in a non-FOIA context, specifically the Federal Tort Claims Act (FTCA).¹⁷³ Additionally, the Court referred to its decision in *United States v. Orleans*¹⁷⁴ in support of the proposition that a grantee must be subject to day-to-day supervision by the federal government to become a federal agency.¹⁷⁵ In *Orleans*, the Court held that receipt of a federal block grant did not make a community action organization an agency subject to the FTCA, because the government did not exercise day-to-day control of the grantee's activities.¹⁷⁶

Along with the extent of government control over a private entity's daily operations and decision-making authority, courts also have considered the entity's organizational structure. For example, in *Rocap v. Indiek*,¹⁷⁷ the District of Columbia Circuit noted several significant organizational features of the Federal Home Loan Mortgage Corporation (FHLMC) and concluded that it was a "Government controlled corporation" subject to the FOIA's requirements.¹⁷⁸ The court referred to the FHLMC's federal charter, its presidentially appointed board of directors, and its staff, who are considered employees of the United States

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 180 n.11.

173. Federal Tort Claims Act, ch. 753, 60 Stat. 843 (codified as amended in scattered sections of 28 U.S.C.). Under the FTCA, the federal government is liable for torts committed by its employees acting within the scope of their employment. 28 U.S.C. § 1346(b) (1988).

174. 425 U.S. 807 (1976).

175. *Forsham*, 445 U.S. at 180 n.11.

176. *Orleans*, 425 U.S. at 815.

177. 539 F.2d 174 (D.C. Cir. 1976).

178. *Id.* at 180-81.

for certain purposes, as "indicia of federal involvement and control which courts have generally relied upon in determining whether an entity is a federal agency."¹⁷⁹ These indicia of control, combined with the government's close supervision of the FHLMC's business transactions, outweighed other factors that argued against agency status, such as the FHLMC's lack of federally appropriated funds.¹⁸⁰

Finally, in a case analogous to private prison operators, *Public Citizen Health Research Group v. Department of Health, Education, and Welfare*,¹⁸¹ the District of Columbia Circuit held that medical peer-review committees are not agencies under the FOIA.¹⁸² In that case, a non-profit corporation comprised of private physicians contracted with HEW to review the necessity and quality of medical services reimbursed through the Medicare and Medicaid programs.¹⁸³ These peer review committees were required by contract to comply with operational standards imposed by statute and HEW's program manual.¹⁸⁴ The trial court termed these restrictions as "pervasive procedural requirements."¹⁸⁵ The appellate court disagreed, however, holding that these controls did not constitute the day-to-day supervision requisite for agency status under *Forsham*.¹⁸⁶ Instead, the court reasoned that these requirements were necessary only to ensure that government funds had been spent properly and that the committees had complied with their HEW contracts.¹⁸⁷ The court held that by merely providing HEW with their expertise under contract, the committee members did not become either government employees or part of a government agency.¹⁸⁸

In summary, courts have considered four factors to determine when a private organization should be treated as an agency under the FOIA. First, and most importantly, a private entity becomes an agency when its operations are subject to

179. *Id.* at 180; cf. *Irwin Memorial Blood Bank of the San Francisco Medical Soc'y v. American Nat'l Red Cross*, 640 F.2d 1051, 1056-58 (9th Cir. 1981) (ruling that the Red Cross is not an agency for FOIA purposes despite its federal charter and presidentially appointed board, because its staff are not United States employees and its operations are not subject to substantial federal control).

180. *Rocap*, 539 F.2d at 176, 180.

181. 668 F.2d 537 (D.C. Cir. 1981).

182. *Id.* at 544.

183. *Id.* at 538-39, 543.

184. *Id.* at 541.

185. *Id.* at 544.

186. *Id.*; see *supra* text accompanying notes 164-76.

187. *Public Citizen*, 668 F.2d at 544.

188. *Id.* at 543-44.

extensive, detailed, and daily control by the federal government.¹⁸⁹ Second, the courts may be guided by analogy to the definition of agency under the FTCA.¹⁹⁰ Third, a private entity is more likely to be an agency if it exhibits certain organizational characteristics of federal agencies, such as holding a federal charter or having a presidentially appointed board of directors.¹⁹¹ Finally, several earlier cases suggest that a private entity with independent authority to make legally binding decisions on behalf of an agency could be considered 'an agency'.¹⁹²

2. Applying the FOIA Definition of Agency to Private Prison Operators

a. The Control Test—A private entity managing a federal prison will be considered an agency under the FOIA only if it is subject to extensive government control of its daily operations.¹⁹³ The contract between the firm and the government may indicate a high degree of control because the prison management firm must comply with whatever standards and supervision that the contract requires.¹⁹⁴ Generally, the contracting agency solicits bids for a particular project through a request for proposals (RFP) that sets out the agency's specifications for the project and conditions for employment.¹⁹⁵ Although many RFPs from the early 1980s contained only general requirements,¹⁹⁶ RFPs issued by the INS and the Bureau of Prisons have in the past been quite specific.¹⁹⁷ INS contracts generally require on-site monitoring by INS offi-

189. *Forsham v. Harris*, 445 U.S. 169, 180 & n.11 (1980).

190. *United States v. Orleans*, 425 U.S. 807, 813-15 (1975). For a discussion of the definition of federal agency under the FTCA, see *infra* text accompanying notes 215-25.

191. See, e.g., *Rocap v. Indiek*, 539 F.2d 174, 181 (D.C. Cir. 1976).

192. See, e.g., *Washington Research Project, Inc. v. Department of Health, Educ. & Welfare*, 504 F.2d 238, 248 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971).

193. See *supra* text accompanying notes 164-76.

194. As one CCA employee told me, "The contract rules all." Telephone Interview with Ramsey Wall, Administrative Assistant, Corrections Corporation of America (July 5, 1994); see also Keating, *supra* note 3, at 140 ("The contract incorporates the norms of conduct to which a private contractor will be held.").

195. Robbins, *supra* note 2, at 613-14.

196. JUDITH HACKETT ET AL., U.S. DEP'T OF JUSTICE, ISSUES IN CONTRACTING FOR THE PRIVATE OPERATION OF PRISONS AND JAILS 43 (1987).

197. See, e.g., Robbins, *supra* note 2, at 613 n.427 (referring to an INS RFP that was 98 pages long and a Bureau of Prisons RFP that was 177 pages long). In the current INS contracting system, for example, the winning proposal may be "about the size of a Sears, Roebuck Christmas catalog" if it entails both building and operating a facility. DiIulio, *supra* note 27, at 162.

cials,¹⁹⁸ who carry a copy of the contract as they walk around the private facilities, observing contract compliance.¹⁹⁹

If the contract spells out detailed performance standards and subjects the contractor to continuous monitoring, it could be argued that the federal government is exercising extensive day-to-day control over the contractor's procedures. On the other hand, despite providing detailed contract procedures, the government may not wield authority over daily prison *operations*. Private sector managers are hired to manage prisons; they, not the government, control the day-to-day rules of prison life.²⁰⁰

The proper role for private sector managers in enforcing prison discipline has been a topic of debate. The practice differs from prison to prison. At least one Bureau of Prisons RFP allows staff members of a private halfway house to serve on the facility's disciplinary committee.²⁰¹ And, in 1985, CCA employees handled disciplinary cases at the Houston INS detention center.²⁰² The degree of the CCA administrator's authority was made clear when he told a reporter: "I review every disciplinary action. . . . I'm the Supreme Court."²⁰³ Although Professor Robbins recommends that all disciplinary cases in private prisons be determined only by government officials,²⁰⁴ others urge that initial disciplinary and classification decisions be left to the private managers, subject only to government review.²⁰⁵ But even if private prison employees could act only as witnesses in government-conducted disciplinary hearings, the government could not completely eliminate private operators' discretion to lodge a complaint, ignore an incident, or settle some disciplinary matters on their own.²⁰⁶

In ascertaining whether the federal government exerts daily operational control over private correctional facilities sufficient to render such organizations federal agencies under the FOIA, the District of Columbia Circuit's analysis in *Public*

198. See DiIulio, *supra* note 27, at 162.

199. E.g., LOGAN, *supra* note 3, at 23; DiIulio, *supra* note 27, at 162.

200. Field, *supra* note 63, at 661 (citing *Burnham v. Oswald*, 342 F. Supp. 880, 884 (W.D.N.Y. 1972)).

201. Robbins, *supra* note 2, at 713 n.847.

202. Tolchin, *supra* note 83, at A15.

203. *Id.*

204. Robbins, *supra* note 2, at 712-13.

205. E.g., LOGAN, *supra* note 3, at 70.

206. Press, *supra* note 31, at 35.

*Citizen Health Research Group v. Department of Health, Education, and Welfare*²⁰⁷ is particularly helpful. Like private prison managers, the medical peer-review committees in *Public Citizen* had to comply with detailed government contracts.²⁰⁸ According to the court, however, the existence of these contracts meant not that the federal government controlled the committees' activities but rather that the contracts established only the terms of employment between private experts and the government and a method of monitoring how governmental funds were spent.²⁰⁹ Similarly, in *Forsham v. Harris*,²¹⁰ the grant agreement between the private grantee and the federal agency was characterized by the Supreme Court as "just the exercise of regulatory authority,"²¹¹ rather than "substantial federal supervision."²¹²

These judicial interpretations of the "control" test lead to the conclusion that courts are unlikely to find private prison operators sufficiently subject to government regulation of their daily affairs to be considered federal agencies under the FOIA. Even when prison managers tailor their performance to detailed government contracts, the courts will most probably portray these contracts as government regulated, not as indicia of an agency relationship. And, according to *Forsham*, this result would not change even if the government retained a right of access to prison records or had contractual authority to take possession of the records but chose not to exercise it.²¹³

b. The Federal Torts Claim Act—Private prison operators also will not constitute federal agencies pursuant to the FTCA's definition of "[f]ederal agency,"²¹⁴ considering the Supreme Court's application of that definition. The FTCA's definition of federal agency excludes government contractors²¹⁵

207. 668 F.2d 537 (D.C. Cir. 1981).

208. *Id.* at 544; see *supra* text accompanying note 184.

209. *Public Citizen*, 668 F.2d at 544.

210. 445 U.S. 169 (1980).

211. *Id.* at 180 n.11.

212. *Id.*

213. *Id.* at 182–86; see *supra* text accompanying notes 169–70.

214. 28 U.S.C. § 2671 (1988).

215. *Id.* The statute provides:

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

and the Court has strictly construed this exclusion.²¹⁶ In *Logue v. United States*,²¹⁷ a Texas county had contracted with the federal government to incarcerate federal prisoners.²¹⁸ The contract provided that the county would house prisoners in compliance with the Bureau of Prisons's rules and regulations governing visitation rights, mail, medical services, employment, communications with attorneys, and methods of discipline.²¹⁹ After a federal prisoner housed in the county jail committed suicide, the federal government was sued under the FTCA for negligence.²²⁰ The court focused on whether the county jail was a federal agency under the FTCA and thus, whether its staff would be considered "employee[s] of the Government" under the FTCA.²²¹

Under the contract with the county jail, the federal government determined the conditions under which its prisoners were incarcerated and retained the right to access the facility to supervise these conditions.²²² Nevertheless, the Court held that the day-to-day operations of the jail remained the responsibility of the county, rather than that of the Bureau of Prisons.²²³ According to the Court, the federal government's role was "limited to the payment of sufficiently high rates to induce the contractor to do a good job."²²⁴ Because the federal government lacked the authority to physically supervise the jail's employees, the county was found to be a contractor under the statute, and therefore not a federal agency within the meaning of the FTCA.²²⁵

Although *Logue* involved a county jail under the FTCA, the case's implications to private prison management are revealing because the Supreme Court has continued to analogize the definition of agency under the FOIA to the definition in the FTCA.²²⁶ First, the Court's holding that the contract in *Logue* did not grant the federal government sufficient control over

216. See, e.g., *Logue v. United States*, 412 U.S. 521, 527-28 (1973).

217. 412 U.S. 521 (1973).

218. *Id.* at 525.

219. *Id.* at 529-30.

220. *Id.* at 522, 525.

221. *Id.* at 526 (quoting 28 U.S.C. § 2671).

222. *Id.* at 529-30.

223. *Id.*

224. *Id.* at 529.

225. *Id.*

226. See *supra* text accompanying notes 173-76.

the jail to make the county an agency under the FTCA suggests that contractual standards governing the operation of private prisons are unlikely to satisfy the FOIA's "control" test.²²⁷ Second, the FTCA's definition of agency specifically excludes federal contractors, whether public or private.²²⁸ As long as the Court continues to interpret the FOIA's definition of agency as interchangeable with the FTCA's definition,²²⁹ it is hard to imagine that the Court will consider a private contractor to be a federal agency under the FOIA when the *Logue* court held that a municipal government entity was not a federal agency under the FTCA.

c. Organizational Structure—The third factor courts have used to ascertain whether a private entity is controlled by the federal government to the extent that it qualifies as a federal agency under the FOIA is the entity's organizational structure.²³⁰ Because most prison management firms exhibit few of the organizational characteristics of a federal agency,²³¹ private prison operators will not satisfy this aspect of the "control" test. Although a few private prisons are managed by nonprofit organizations,²³² the giants in the industry are for-profit business corporations.²³³ Unlike the private contractor examined in *Rocap v. Indiek*,²³⁴ prison management firms are not federally chartered and do not have presidentially appointed boards of directors. Unlike federal agencies, these corporations must answer to shareholders, a more demanding constituency than employees or the general public, and therefore freely pursue business opportunities wherever they may lie, including the management of both state and local facilities.²³⁵

d. Pre-FOIA Test of Agency under the APA—Prior to the addition of an agency definition to the FOIA in 1974, courts

227. See *supra* Part II.A.2.a.

228. 28 U.S.C. § 2671 (1988).

229. See *supra* text accompanying notes 173–76.

230. See *supra* text accompanying notes 177–80.

231. See *LOGAN*, *supra* note 3, at 14 (describing private prisons as closely held, publicly traded, or employee owned).

232. See *id.* at 18 (describing the Eckerd Foundation, a nonprofit organization, which operates the Eckerd Youth Development Center, in Okeechobee, Florida).

233. See *AMMONS ET AL.*, *supra* note 19, at 28 (noting that the "industry leaders" are CCA and Wackenhut Corrections Corporations).

234. See *supra* text accompanying notes 177–80.

235. For example, in 1994, CCA managed four federal prisons and three detention centers that housed both federal and state offenders, in addition to 12 state and local prisons, and also co-managed facilities in Australia and Great Britain. See *CCA FACILITY PROFILES*, *supra* note 115, at 1–7.

considered whether a private entity had the authority to make legally binding decisions on behalf of an agency to determine if a private entity would be subject to the FOIA.²³⁶ Arguably, if a private prison operator were not subject to sufficient federal control to constitute an agency under *Forsham*, then it had independent authority to make its own decisions.

Even if the courts continued to apply the independent authority test to private prison operators, only rarely would they find that the operator maintained this kind of decision-making ability. While private prison operators may not be subject to government control over daily operations, they are still subject to contractual provisions and to agency direction and review.²³⁷ Certainly, prison management firms have no statutory authority to make legally binding decisions on behalf of federal correctional agencies.²³⁸ In this sense, a private prison manager is similar to a private firm hired by a federal prison to provide laundry services. Were a prison management firm held to exercise independent decision-making authority on behalf of an agency, then all government contractors should be subject to the FOIA.

Private prison operators, however, differ significantly from private companies hired to launder inmates' uniforms—washing clothes cannot be considered an exclusively governmental function. As a matter of policy, private prison operators perform exclusively governmental functions when they contract with the state to manage prisons.²³⁹ Corrections is an integral part of the criminal justice system, involving the exercise of government authority to deprive citizens and aliens of their liberty and to control their existence behind bars.²⁴⁰ In the one reported case involving private federal detention,²⁴¹ a federal

236. See *supra* text accompanying notes 146–59.

237. See *supra* text accompanying notes 194–97.

238. See *supra* note 159.

239. See, e.g., Becker, *supra* note 69, at 93 (suggesting that the “sovereign power of punishment” is a core public function); Field, *supra* note 63, at 669 (“[C]onstruction and operation of a prison has traditionally been a government responsibility and an indispensable part of the administration of the criminal law.”); Robbins, *supra* note 66, at 936 (arguing that incarcerating prisoners is “intrinsicly governmental in nature”). But see McDonald, *supra* note 45, at 183 (maintaining that historically incarceration has not been an “intrinsicly governmental function”).

240. See Field, *supra* note 63, at 669.

241. *Medina v. O'Neill*, 589 F. Supp. 1028 (S.D. Tex. 1984), *vacated in part, rev'd in part on other grounds*, 838 F.2d 800 (5th Cir. 1988); see *supra* note 95 for a description of the case.

district court reasoned that the defendants' behavior constituted "state action" because the power to detain illegal aliens falls within the "*exclusive prerogative of the State.*"²⁴² Likewise, the ability to incarcerate criminals is a public function; whether it can be delegated to the private sector is a separate issue.²⁴³

Although an entity's performance of a public function has been suggested as a more appropriate test for determining agency status under the FOIA,²⁴⁴ this test is hardly ever used by the courts. In a rare instance, a federal district court held that the Smithsonian Institution was an agency subject to the FOIA in part "because [the Smithsonian] performs governmental functions as a center of scholarship and national museum responsible for the safekeeping and maintenance of national treasures."²⁴⁵ The court, however, also based its decision on the Smithsonian's organizational structure—its federal charter, federal funding, and civil service employees.²⁴⁶

According to the prevailing judicial interpretations discussed above, private prison management firms under contract to the federal government are unlikely to be considered agencies for FOIA purposes even though they "perform governmental functions and control information of interest to the public."²⁴⁷

B. Do Records Created by a Private Prison Operator Constitute "Agency Records" Subject to FOIA Disclosure?

1. The FOIA's Definition of Agency Records—While private prison operators may not be federal agencies under the FOIA according to the courts, their records may nevertheless constitute agency records. Before materials can be obtained from an agency under the FOIA, the desired information first must

242. 589 F. Supp. at 1038.

243. See *supra* text accompanying notes 92–105.

244. See Wright, *supra* note 159, at 1225. But cf. Edward C. Walterscheid, *Access to Federally Funded Research Data Under the Freedom of Information Act*, 15 RUTGERS COMPUTER & TECH. L.J. 1, 59 (1989) (warning that any test allowing federally funded research data to be available under the FOIA would hurt U.S. economic competitiveness).

245. Cotton v. Adams, 798 F. Supp. 22, 24 (D.D.C. 1992).

246. *Id.*

247. H.R. REP. NO. 876, *supra* note 161, at 8, reprinted in 1974 U.S.C.A.N. at 6274.

have been memorialized in the form of a record.²⁴⁸ More precisely, the FOIA only applies to "agency records," although the FOIA never defines that term.²⁴⁹ The term implies, however, the existence of some connection between the requested record and a federal agency.²⁵⁰ In a trio of leading cases, the Supreme Court has established that an agency must have custody and control of records to create a sufficient nexus for a finding of agency record status.

In *Kissinger v. Reporters Committee for Freedom of the Press*,²⁵¹ the Court held that the FOIA requires an agency to disclose only the documents that it has "created and retained."²⁵² In that case, FOIA requests had been filed with the Department of State for notes of Henry Kissinger's telephone conversations when he was Secretary of State and Assistant to the President for National Security Affairs.²⁵³ Before two of the requests were filed, Kissinger had donated the material to the Library of Congress, which is not an agency subject to the FOIA.²⁵⁴ The Court held that in refusing to honor these two FOIA requests, the Department of State had not improperly withheld agency records because the Department neither possessed nor controlled the documents at the time the requests were made.²⁵⁵ Furthermore, the Court held that federal agencies have no obligation to retrieve documents that are no longer in their custody.²⁵⁶

248. For a discussion of the physical characteristics of records under the FOIA, see Ann H. Wion, Note, *The Definition of "Agency Records" Under the Freedom of Information Act*, 31 STAN. L. REV. 1093, 1095-98 (1979) (noting that courts have held that film, audio tape, and computer data are records and arguing that even materials not designed to store information should constitute records under the FOIA if they contain information that "a citizen might want to know").

249. The FOIA's disclosure provision applies to "records," 5 U.S.C. § 552(a)(3) (1988), but its enforcement provision refers to "agency records," 5 U.S.C. § 552(a)(4)(B) (1988). In *Forsham v. Harris*, the Court stated that "[s]ince the enforcement provision of the Act . . . refers only to 'agency records' it is certain that the disclosure obligations imposed . . . were only intended to extend to agency records." 445 U.S. 169, 178 n.8 (1980).

250. In *Forsham*, the Court noted that "[t]he use of the word 'agency' as a modifier demonstrates that Congress contemplated some relationship between an 'agency' and the 'record' requested under the FOIA." 445 U.S. at 178.

251. 445 U.S. 136 (1980).

252. *Id.* at 152.

253. *Id.* at 142-43.

254. *Id.* at 154-55.

255. *Id.* at 155.

256. *Id.* at 139 ("We hold today that even if a document requested under the FOIA is wrongfully in the possession of a party not an 'agency,' the agency which received the request does not 'improperly withhold' those materials by its refusal to institute a retrieval action.").

In addition, the Court stressed that mere possession of a record by an agency is not sufficient to create an agency record subject to the FOIA. In a third FOIA request, a columnist sought notes of telephone conversations made by Kissinger when he was National Security Adviser that were kept in Kissinger's office at the Department of State.²⁵⁷ Notwithstanding the fact that this request was made after the materials were transferred to the Library of Congress,²⁵⁸ the Court held that they were not agency records subject to FOIA disclosure.²⁵⁹ Kissinger made the notes as a presidential advisor. The Court concluded that the notes, as presidential papers, were excluded from the FOIA.²⁶⁰ Although Kissinger stored the notes at the Department of State, the Court emphasized that the Department of State neither created nor controlled them.²⁶¹ "We simply decline to hold that the physical location of the notes of telephone conversations renders them 'agency records.'"²⁶²

The second case, *Forsham v. Harris*,²⁶³ involved records of a nonagency that an agency did not possess, but were arguably subject to an agency's control.²⁶⁴ In *Forsham*, the Court asserted that possession in addition to control was required for materials to be agency records.²⁶⁵ *Forsham* involved research data generated by private grantees under a federal research grant.²⁶⁶ The grantees maintained custody of the data and submitted only research summaries to the government.²⁶⁷ Although the government retained the right to take possession of the data, it never exercised that right.²⁶⁸ HEW, the grantor agency, refused to honor a FOIA request for the data in part because it believed the information belonged to a private organization.²⁶⁹

257. *Id.* at 143-44.

258. *Id.* at 142.

259. *Id.* at 155.

260. *Id.* at 156 (explaining that the FOIA's legislative history reveals that the "Executive Office" does not include the Office of the President).

261. *Id.* at 157.

262. *Id.*

263. 445 U.S. 169 (1980).

264. For the information at issue in *Forsham*, see *supra* text accompanying notes 166-72.

265. *Forsham*, 445 U.S. at 182.

266. *Id.* at 171-77.

267. *Id.* at 172-73.

268. *Id.* at 173.

269. *Id.* at 176.

The Court agreed with HEW, holding that the data were not agency records because they had been "generated" by a private organization and had never been "obtained" by an agency.²⁷⁰ Discerning a "possessory emphasis" in the Act's legislative history,²⁷¹ the Court stated that "the FOIA applies to records which have been *in fact* obtained, and not to records which merely *could have been* obtained."²⁷² The Court reasoned that requiring the agency to respond to the FOIA request by exercising its right of access to the data would be the same as forcing an agency to "create" a record.²⁷³ According to *Forsham*, then, an agency must have actual physical possession of a document for it to become an agency record. Neither an agency's right to possession nor its use of a privately created document is enough.²⁷⁴

In the third case, *Department of Justice v. Tax Analysts*,²⁷⁵ the Court reemphasized possession and control as the touchstones of agency record status when records are created by a nonagency. In that case, the publisher of a weekly tax magazine filed a FOIA request with the Department of Justice to obtain district court tax opinions and final orders used by the Department in litigating tax cases.²⁷⁶ In holding that the court opinions were subject to FOIA disclosure, the Court outlined a two-part test for determining when records qualify as agency records. First, an agency must "either create or obtain" the requested materials,²⁷⁷ and second, the agency must control those materials at the time the FOIA request is made.²⁷⁸

For an agency to have control over a record, the Court explained, "the materials [must] have come into the agency's possession in the legitimate conduct of its official duties,"²⁷⁹ and must not include personal papers belonging to agency employees.²⁸⁰ The Court noted that if agency records were limited to those created by the agency, such a definition would violate the FOIA's purpose of "giving the public access to all nonexempted

270. *Id.* at 178.

271. *Id.* at 185.

272. *Id.* at 186.

273. *Id.*

274. *Id.* at 182.

275. 492 U.S. 136 (1989).

276. *Id.* at 139.

277. *Id.* at 144 (quoting *Forsham v. Harris*, 445 U.S. 169, 182 (1980)).

278. *Id.* at 145.

279. *Id.*

280. *Id.*

information received by an agency as it carries out its mandate."²⁸¹ The Court dismissed the Department of Justice's argument that materials created outside of an agency should be accessible under the FOIA only if they were created for the purpose of assisting agency decision making, holding that the FOIA did not qualify disclosure on the intent of those who draft records.²⁸²

2. The FOIA's Definition Applied to Privatized Prisons—Kissinger, Forsham, and Tax Analysts have many ramifications for private prisons operated pursuant to federal government contracts. A private prison operator creates or is a party to at least two types of documents. First, the prison management firm and the agency enter into a contract governing all aspects of prison operations. This contract may consist of the agency's RFP and the winning bidder's response,²⁸³ and may include various amendments over time.²⁸⁴ Second, most prison managers are required by the contract to submit periodic summaries and incident reports to the contracting agency.²⁸⁵ Finally, prison managers create and maintain their own internal records system.

The first two types of documents—the contract with the agency and any periodic or incident reports provided to the agency—are within the agency's possession and control. According to *Forsham*, records created by nonagencies become agency records upon transfer to an agency subject to the FOIA.²⁸⁶ Prison records created by a private management firm that are obtained by a federal agency, therefore, will be subject to FOIA disclosure. However, if the government only reserves a contractual right to possess prison records but does

281. *Id.* at 147.

282. *Id.*

283. *See supra* notes 195–200 and accompanying text.

284. *See, e.g.,* Robbins, *supra* note 2, at 649 n.582 (discussing an amendment to the CCA's Hamilton County, Tennessee Contract that reduced its general liability insurance made within two years of the initial contracting); *see also* HACKETT ET AL., *supra* note 196, at 42 (reporting that Hamilton County has a 32-year contract).

285. *See* HACKETT ET AL., *supra* note 196, at 43. Periodic summaries are regular reports filed on a monthly, quarterly, or annual basis. Incident reports, on the other hand, deal with more unusual events at the facility, such as inmate violence, prisoner death, or attempted escape. *Id.*

286. *Forsham v. Harris*, 445 U.S. 169, 185–86 (1980); *see supra* text accompanying notes 270–74; *see also* *Weisberg v. United States Dep't of Justice*, 631 F.2d 824 (D.C. Cir. 1980) (holding that copyrighted photographs voluntarily submitted to the Department of Justice by private company are agency records).

not actually take custody of them, *Forsham* mandates that the documents are not agency records.²⁸⁷

Even if an agency actually takes possession of certain private prison records, these documents may fall within one of the FOIA exemptions. The FOIA exemption invoked most frequently with respect to records transferred to agencies by government contractors is the fourth exemption (Exemption 4),²⁸⁸ which protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."²⁸⁹ Exemption 4 was designed to protect both the government and businesses that provide proprietary information to federal agencies by encouraging businesses to submit voluntarily information upon which the government may rely in making "intelligent, well informed decisions."²⁹⁰

Courts have disagreed about the meaning of the term "trade secrets" as used in Exemption 4.²⁹¹ Some have held that trade secrets encompass any information used in a business that provides a competitive advantage.²⁹² In 1983, however, the District of Columbia Circuit adopted a more narrow definition of the term, holding that trade secret includes only "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort."²⁹³ Under this interpretation, trade secrets must relate directly to manufacturing or production. This less expansive definition appears to be gaining acceptance. In 1990, it was adopted by the Court of Appeals for the Tenth Circuit, which held

287. *Forsham*, 445 U.S. at 186; see *supra* text accompanying notes 270-72.

288. See Thomas M. Susman, *Risky Business: Protecting Government Contract Information Under the Freedom of Information Act*, 16 PUB. CONT. L.J. 15, 20 (1986) (discussing the business information exemption currently codified at 5 U.S.C. § 552(b)(4) (1988)).

289. 5 U.S.C. § 552(b)(4) (1988) (Exemption 4).

290. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 767 (D.C. Cir. 1974).

291. See generally FOIA OVERVIEW, *supra* note 135, at 104-05 (discussing conflicting judicial interpretations of Exemption 4).

292. See, e.g., *Union Oil Co. v. Federal Power Comm'n*, 542 F.2d 1036, 1044 (9th Cir. 1976) (defining "trade secret[s]" to include a "compilation of information which is used in one's business, and which gives . . . an opportunity to obtain an advantage over competitors").

293. *Public Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

that it was more consistent with the FOIA's general purpose than the broader definition.²⁹⁴

Because prison management generally does not involve the manufacturing or production of goods, private prison operators are more likely to invoke the confidential commercial information prong of Exemption 4 than they are the trade secret prong.²⁹⁵ Information other than trade secrets falls within Exemption 4 if it is "(1) commercial or financial, (2) obtained from a person, and (3) privileged or confidential."²⁹⁶

Courts have construed "commercial or financial" broadly, stating that records are possibly commercial if the submitter could have a conceivable commercial interest in them.²⁹⁷ Similarly, the requirement that information be obtained from a "person" is easily satisfied. The term "person" has been held to include a wide variety of entities other than the U.S. Government, including corporations²⁹⁸ and foreign government agencies.²⁹⁹

Whether information submitted to a federal agency qualifies as confidential under Exemption 4 has generated substantial litigation.³⁰⁰ For almost twenty years, the leading case on this issue was *National Parks & Conservation Association v. Morton*.³⁰¹ In *National Parks*, the District of Columbia Circuit established that records are confidential within Exemption 4 if disclosure would be likely either "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."³⁰²

294. *Anderson v. Department of Health and Human Serv.*, 907 F.2d 936, 944 (10th Cir. 1990).

295. *But cf. DiIulio, supra* note 27, at 162 (characterizing prison management contract proposals as "trade secrets").

296. *Public Citizen*, 704 F.2d at 1290 (citing *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974)).

297. *Id.* (citing *Washington Research Project, Inc. v. Department of Health, Educ. & Welfare*, 504 F.2d 238, 244 n.6 (D.C. Cir. 1974)).

298. *See, e.g., Allnet Communications Serv., Inc. v. FCC*, 800 F. Supp. 984, 988 (D.D.C. 1992).

299. *E.g., Comstock Int'l (U.S.A.), Inc. v. Export-Import Bank*, 464 F. Supp. 804, 806-07 (D.D.C. 1979).

300. *E.g., Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971); *Consumers Union v. Veterans Admin.*, 301 F. Supp. 796 (S.D.N.Y. 1969).

301. 498 F.2d 765 (D.C. Cir. 1974).

302. *Id.* at 770 (citation omitted). The court reserved the question as to whether additional governmental interests, such as compliance or program effectiveness, might be included under the "confidential" prong of Exemption 4. *Id.* at 770 n.17.

In 1992, the District of Columbia Circuit sitting en banc revised the *National Parks* test in *Critical Mass Energy Project v. Nuclear Regulatory Commission*.³⁰³ By a vote of seven to four,³⁰⁴ the court reaffirmed the general principle of the *National Parks* test, but limited its application to information that persons are *required* to provide to the government.³⁰⁵ The court formulated an entirely new test for information voluntarily submitted to federal agencies, holding that such information is confidential under Exemption 4 "if it is of a kind that would customarily not be released to the public by the person from whom it was obtained."³⁰⁶ The court reasoned that when an entity is required to provide information to a federal agency, Exemption 4 protects the government's interest in ensuring that the information remains reliable.³⁰⁷ On the other hand, when an entity furnishes proprietary information to an agency voluntarily, Exemption 4 encourages continued cooperation with the government.³⁰⁸ According to the court, those who willingly provide the government with confidential information are likely to refuse future cooperation if agencies disclose such information to the public.³⁰⁹ Therefore, commercial information that has been provided voluntarily to an agency may be withheld without a showing of likely government impairment or substantial competitive harm to the provider if the information is of the kind not customarily disclosed to the public.³¹⁰ Furthermore, the agency invoking Exception 4 bears the burden of proof in showing the provider's custom.³¹¹

With respect to records furnished by a prison management firm to an agency, the applicable test under Exemption 4 depends on whether the prison operator submits the information willingly or pursuant to the contract. Presumably, federal prison management contracts will require operators to file periodic reports, in which case the two-part *National Parks*

303. 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993).

304. The dissenting opinion took a more functional approach to applying Exemption 4 by advocating disclosure of the requested reports "to advance public understanding of the nature and quality of the NRC's [Nuclear Regulatory Commission's] oversight operations or activities." *Id.* at 885 (Ginsburg, J., dissenting).

305. *Id.* at 872.

306. *Id.* at 879.

307. *See id.* at 878.

308. *Id.*

309. *Id.* (citing *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 768 (D.C. Cir. 1974)).

310. *Id.*

311. *Id.*

test applies.³¹² Under the first part of that test, the "impairment" prong, the *Critical Mass* court recognized that circumstances may exist where disclosure could impair the reliability of data that are required to be submitted.³¹³ In other words, an agency may properly withhold compelled commercial information by demonstrating that FOIA disclosure will diminish the reliability of what is supplied. For example, an agency could withhold a prison management firm's monthly reports stipulated by contract if it determined that FOIA disclosure would result in less accurate reports in the future.

An agency may also withhold compelled confidential information under the second part of the *National Parks* test, the "competitive harm" prong, if disclosure would cause substantial competitive injury to the provider.³¹⁴ In making this determination, courts have examined each situation on a case-by-case basis.³¹⁵ Actual competitive harm from the disclosure need not be shown; courts have held that the existence of competitors, in addition to a showing of the likely substantial injury, will suffice.³¹⁶ Courts have recognized many different kinds of competitive injury.³¹⁷ For example, protected information may include actual cost data and break-even calculations in a government contract situation.³¹⁸ Whether a private prison operator could rely on the "competitive harm" prong to justify an agency's withholding of records would depend on the operator's position in the marketplace and the manner in

312. See *supra* text accompanying note 302.

313. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 878 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1579 (1993).

314. Pursuant to Executive Order No. 12,600, agencies must notify providers of confidential commercial information that the agency may be required to disclose such information. The executive order allows providers a reasonable amount of time to object to disclosure. Exec. Order No. 12,600, 3 C.F.R. 235 (1988), *reprinted in* 5 U.S.C. § 552 (1988).

The Supreme Court has recognized the right of a business to challenge the disclosure of commercial information under the APA if the release of the records is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 317-18 (1979) (quoting 5 U.S.C. § 706).

315. FOIA OVERVIEW, *supra* note 135, at 125.

316. *Gulf & Western Indus. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979). *But cf. Critical Mass*, 975 F.2d at 878 (suggesting that the commercial threat must be more significant to withhold compelled information than to withhold voluntary information because with compelled information, there is no presumptive threat to government interests).

317. See FOIA OVERVIEW, *supra* note 135, at 131-32 n.174-83.

318. *E.g., Gulf & Western Indus.*, 615 F.2d at 530.

which the desired records reveal the conduct or planning of the operator's business.³¹⁹

Even if an agency has a contractual right to certain prison records, an agency's unexercised ability to compel submission does not preclude a finding that the records were "voluntarily" provided to the agency.³²⁰ In *Critical Mass*, the Institute for Nuclear Power Operations (INPO), a private, nonprofit corporation comprised of nuclear power operators, voluntarily transferred safety reports to the Nuclear Regulatory Commission (NRC) pursuant to the NRC's agreement not to release the reports to third parties without the INPO's consent.³²¹ Although the INPO was not subject to NRC regulation, its members were.³²² Therefore, the NRC could have compelled submission of the safety reports directly from the INPO members; however, the NRC had no need to do so, preferring, instead, to receive them voluntarily from the INPO.³²³ The requester sought disclosure of the reports under the FOIA, arguing that the court's new test for voluntarily submitted information would allow the industry to avoid the FOIA by "volunteering" information the government already had a right to receive.³²⁴ The court rejected this argument, saying there is "no provision in the FOIA that obliges agencies to exercise their regulatory authority in a manner that will maximize the amount of information that will be made available to the public through that Act."³²⁵ The court refused to disturb what it considered to be the NRC's discretion in choosing the best way to procure the information it required.³²⁶

As a result, theoretically, a prison operator could submit operations reports on a voluntary basis, even though its contract gave the agency the power to compel production of the same reports. By providing the information voluntarily, records

319. See, e.g., *Professional Review Org. of Florida v. Department of Health & Human Serv.*, 607 F. Supp. 423, 425-26 (D.D.C. 1985) (ruling that records pertaining to government contract were properly withheld under Exemption 4 because they related to the manner in which the contractor proposed to conduct business under contract).

320. *Critical Mass*, 975 F.2d at 880.

321. *Id.* at 874.

322. *Id.*

323. *Id.*

324. See *id.* at 880.

325. *Id.*

326. *Id.*

would be confidential under Exemption 4 so long as they were of a kind the operator customarily withheld from the public.³²⁷

Will the initial contract governing prison operations be subject to disclosure under the FOIA? Although prison management firms elect to respond to RFPs, this fact alone should not determine whether the resulting contract is submitted voluntarily for the purposes of the *Critical Mass* test. Instead, courts should consider whether the proposal and any additional contract information was required to be submitted by those bidders who chose to participate in the bidding process.³²⁸

Regardless of whether the *Critical Mass* test or the *National Parks* test is used, prison management contracts probably are protected from FOIA disclosure by Exemption 4 because allowing public scrutiny of a winning proposal would probably also cause substantial competitive harm to the prison operator. If the contract became available to the public, other prison management firms would be in a position to alter their own procedures or to outbid the operator at contract renewal time.³²⁹ Furthermore, the agency's ability to attract innovative prison management proposals could be impaired if winning proposals were subject to FOIA disclosure.³³⁰ Certain portions of prison management contracts, however, should be available under the FOIA for public scrutiny pursuant to the Act's requirement that "[a]ny reasonably segregable portion of a record" be released after application of the appropriate exemptions.³³¹ Segregable contract provisions should include any matters that, if disclosed, would not provide competitors with proprietary information. Disclosable terms should include monitoring and reporting requirements, although no reported case has so held.

With respect to internal prison records created and maintained by a private management firm, *Kissinger* and *Forsham* establish that such documents will not constitute agency

327. See *supra* text accompanying notes 309–11.

328. See FOIA OVERVIEW, *supra* note 135, at 112–19 (discussing the *Critical Mass* test and stating the Department of Justice's disclosure guidelines).

329. See, e.g., *Gulf & Western Indus. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979) (holding that contract information was properly withheld because it would allow competitors to undercut a contractor's bid).

330. See, e.g., *Orion Research, Inc. v. EPA*, 615 F.2d 551, 554 (1st Cir.), *cert. denied*, 449 U.S. 833 (1980) (holding that a technical proposal was properly withheld because disclosure would have "chilling effect" on willingness of potential bidders to submit proposals).

331. 5 U.S.C. § 552(b) (1988).

records for FOIA purposes.³³² Internal documents regarding daily prison operations kept by the private firm are neither created by nor within the possession of an agency.³³³ Even if the contract gives the agency a right to access or ultimate possession of these records, *Forsham* held that an unexercised right to control records will not suffice to make them agency records under the FOIA.³³⁴

In *Forsham*, Justice Brennan, in a dissenting opinion joined by Justice Marshall, argued that agencies should not be allowed to evade FOIA disclosure on technicalities, such as whether an agency has possession of documents that are of interest to the public.³³⁵ Instead, Justice Brennan would consider two factors in determining when a record constitutes an agency record: (1) the importance of the record to the public's understanding of agency action and (2) the nexus between the agency and the record.³³⁶ Under this test, if access to the record would increase public awareness of government operations, rather than the internal affairs of the nonagency, then the legislative intent behind the FOIA suggests that the record should be available for public scrutiny.³³⁷ Justice Brennan also premised disclosure on the requirement that the agency use or rely upon the record as "part of the regulatory process."³³⁸ Justice Brennan, however, maintained that the majority's possession test for agency record status undermines the FOIA's purpose because "[g]overnment by secrecy is no less destructive of democracy if it is carried on within agencies or within private organizations serving agencies."³³⁹

Several commentators also have criticized the Court's reliance on possession as the key to agency record status, suggesting instead that the Court take a broader approach.³⁴⁰

332. See *supra* text accompanying notes 251-74.

333. See *supra* text accompanying note 252.

334. See *supra* text accompanying notes 270-74.

335. *Forsham v. Harris*, 445 U.S. 169, 188 (1980) (Brennan, J., dissenting).

336. *Id.* at 188-89.

337. *Id.* at 189.

338. *Id.* at 190.

339. *Id.* at 190.

340. See, e.g., Marie V. O'Connell, Note, *A Control Test for Determining "Agency Record" Status Under the Freedom of Information Act*, 85 COLUM. L. REV. 611, 612 (1985) (advocating a control test for determining when a document is an agency record); Wion, *supra* note 248, at 1095 (arguing that the definition of agency record should comport with the full disclosure policy underlying the FOIA); Wright, *supra* note 159, at 1242-55 (arguing either that courts should consider private entities that perform government functions as agencies under the FOIA or that Congress should

Generally, these commentators agree with Justice Brennan that an arbitrary possession standard defeats the FOIA's purpose of allowing public access to government information. Lower courts, however, have not responded to these arguments.³⁴¹

Ultimately, prison records created and maintained by private prison management firms are unlikely to be considered agency records and therefore will not be subject to the FOIA. This will be the case even if the agency retains a right to inspect or take possession of the records, as long as actual custody of the documents stays with the private operator.³⁴² Records transferred to the agency will be considered agency records subject to the FOIA,³⁴³ however, they may be protected from disclosure under Exemption 4.³⁴⁴ Under the *Critical Mass* test, prison records that are submitted voluntarily to an agency will be exempt if they are of the kind not customarily provided by the operator to the public.³⁴⁵ Records that are required to be provided to the agency will be exempt if their release would likely impair the agency's ability to obtain reliable information in the future or cause substantial competitive harm to the provider.³⁴⁶ Under either test, the contract between the operator and the agency will be at least partially exempt from disclosure.³⁴⁷

amend the FOIA to broaden the definition of agency records). *But cf.* Walterscheid, *supra* note 244, at 59 (suggesting that failure to restrict the definition of agency records to exclude federally funded research data in the possession of nonagencies undermines American economic competitiveness).

341. See, e.g., *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 880 (D.C. Cir. 1992) (explaining that the FOIA does not obligate agencies to maximize information available to the public under the Act); see also *Animal Legal Defense Fund v. Secretary of Agriculture*, 813 F. Supp. 882, 891-92 (D.D.C. 1993) (citing *Critical Mass* for the proposition that regulations allowing a private entity to retain possession of plans "on-site" and thus not disclose the information does not violate the FOIA).

342. See *supra* notes 263-74 and accompanying text.

343. See *supra* notes 275-82 and accompanying text.

344. See *supra* notes 288-90 and accompanying text.

345. See *supra* notes 303-11 and accompanying text.

346. See *supra* notes 314-19 and accompanying text.

347. See *supra* notes 325-31 and accompanying text.

III. PROPOSED SOLUTIONS: EVALUATION AND ANALYSIS

Over the past fifteen years, the FOIA has been criticized for subjecting private entities to what is arguably unfair scrutiny by competitors, shareholders, lawyers, and others who use the Act for private gain rather than for the public good.³⁴⁸ Critics have described the FOIA as "a lawful tool of industrial espionage,"³⁴⁹ used by savvy business executives and their corporate attorneys to file thousands of FOIA requests annually in order to learn what their competition, rather than their government, is up to.³⁵⁰ Such critics claim that the business community's self-serving use of the FOIA defeats the Act's purpose and violates the privacy interests of nongovernmental entities that are required to submit confidential information to the government.³⁵¹ One commentator recently suggested a remedy that would have the Supreme Court limit FOIA disclosure to records dealing with governmental, rather than private, activities.³⁵²

Privatization of federal prisons presents the flip side of this same argument. While the FOIA may mandate disclosure of too much information concerning the nongovernmental activities of private entities, it mandates disclosure of too little information when private companies perform governmental

348. See, e.g., Fred H. Cate et al., *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41, 43-44 (1994) (discussing the use of the FOIA by business persons to access information on competitors).

349. Stephen S. Madsen, Note, *Protecting Confidential Business Information from Federal Agency Disclosure After Chrysler Corp. v. Brown*, 80 COLUM. L. REV. 109, 113 (1980) (discussing the use of the FOIA by businesspersons to access information on competitors).

350. Most FOIA requests are made by businesses, including foreign corporations, seeking information about their competitors. See, e.g., MIDDLETON & CHAMBERLIN, *supra* note 122, at 470 (finding that more than half of all FOIA requests are filed by businesses seeking information about government regulations and their competitors); Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 665-67 (1984) (reporting that four out of five FOIA requests are made by business executives or their attorneys).

351. See Cate et al., *supra* note 348, at 44.

352. *Id.* at 67-68; see also Forsham v. Harris, 445 U.S. 169, 189 (1980) (Brennan, J., dissenting) ("If, for instance, the significance of the record is limited to understanding the workings of the nonagency, the public has no FOIA-protected interest in access.").

functions, such as the operation and management of correctional facilities. When a federal agency delegates a public function to a private contractor, the agency, in effect, frustrates the purpose of the FOIA. Records created through the performance of a public duty that would have been available to the public but for the delegation become insulated from disclosure by virtue of the contractor's nonagency status. This circumvention of the Act is especially troublesome in the context of private prisons, where prisoners' liberty interests and well-being are at stake. According to the accountability principle,³⁵³ private prisons should be just as accountable as public prisons. To meet this goal, the prisoners, the press, and the public must be able to scrutinize the activities of private contractors, just as they already may scrutinize public correctional activities under the FOIA. The remainder of this Article considers three approaches to the accountability problem and concludes that Congress should enact legislation subjecting federal prison records that are created and maintained by private management firms to disclosure under the FOIA as part of a comprehensive program to guard against contractor abuse.

A. Insisting on Intensive Government Monitoring of Private Prisons

As noted earlier in this Article, both critics and supporters of prison privatization agree that private prison operators must be held accountable for the way they perform their delegated duties.³⁵⁴ Various monitoring schemes have been proposed, most involving document review and on-site prison inspections conducted by government representatives.³⁵⁵ For example, Professor Robbins's Model Contract calls for an employee of the contracting agency to have access to prison facilities and all records kept by the contractor at all times.³⁵⁶ The Model Contract further requires the contractor to maintain all records

353. See *supra* text accompanying notes 3-4, 67-91.

354. See *supra* text accompanying notes 3-4, 67-91.

355. See, e.g., Allen, *supra* note 3, at 39; Keating, *supra* note 3, at 144-46.

356. Robbins, *supra* note 2, at 752.

required by the American Correctional Association's standards for facility accreditation and the contracting agency.³⁵⁷

If the prison management firm grants the correctional agency complete access to prison records, as the Model Contract requires, the lack of public access to these documents through the FOIA may not be a significant issue. After all, any records actually transferred to an agency will be disclosable under the FOIA.³⁵⁸ Private contractors, wary of contract renewal time, are likely to submit only subjective, self-serving, or inoffensive reports to the contracting agency.³⁵⁹ But as long as the government can review all other internal records, accountability, arguably, has been sufficiently guaranteed.

This analysis presents several problems. First, it raises questions as to how effective a monitor the government will be. The government's right to examine internal prison documents is meaningful only if administrators in fact review the records, and take action to correct any problems revealed upon review. Because of budgetary constraints, many agencies are understaffed and thus, perusing documents and inspecting private facilities is a low priority.³⁶⁰ Constant supervision of prison operations and records, including any on-site monitoring, is expensive.³⁶¹ An agency therefore has little incentive to convert cost savings into monitoring expenses.

Second, the private correctional firm that procures an initial contract with the government may become absorbed with its responsibilities.³⁶² Once the government correctional agency has contracted for correctional services with the private sector, it may no longer have ready access to the facilities or the staff necessary to resume prison operations should the private

357. *Id.*

358. *See supra* notes 275-82 and accompanying text.

359. For example, in *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group*, 596 So. 2d 1029 (Fla. 1992), a newspaper sought access under the Florida Public Records Act, FLA. STAT. ANN. 119 (West 1985), to files concerning the construction of public schools. The files were in the possession of an architectural firm hired by a school district. The newspaper wanted access to the firm's internal records because it claimed that the documents provided to the school district by the firm were merely self-serving pronouncements. *See also* Susman, *supra* note 288, at 29 (advising that to protect contract information from FOIA disclosure, a contractor should provide for the release of "sanitized, composite, or innocuous information where feasible").

360. *See* Keating, *supra* note 3, at 146.

361. E.S. SAVAS, *PRIVATIZING THE PUBLIC SECTOR: HOW TO SHRINK GOVERNMENT* 153 (1982) (estimating monitoring costs to be one to five percent of the total contract price).

362. Brakel, *supra* note 21, at 31.

operator prove unsatisfactory.³⁶³ Having invested in the start-up costs of operating a prison, the initial operator will be able to out-bid competing management firms. Eventually, this price advantage could permanently drive away the competition.³⁶⁴ Without alternate prison operators from which to choose, the contracting agency will be hard pressed to remove the initial contractor. Furthermore, by terminating a prison management contract and replacing a private operator for misfeasance, the agency itself could receive negative publicity. Rather than being "tarred with the same brush," the contracting agency might prefer not to monitor prison operations too closely.³⁶⁵

Third, government monitors are at risk of "capture" by the private management firms which they are employed to oversee.³⁶⁶ Whether as a result of a contractor's "overt corruption or subtle cooptation,"³⁶⁷ a government regulator may turn a blind eye to contract violations or other abuses. Prison monitors are particularly prone to this risk because many private prison managers hire government employees to staff their operations. In 1994, for example, each of the CCA's nineteen American prison facilities was run by a former government corrections employee.³⁶⁸ When an official contract monitor knows that he may have a future employment opportunity with the private firm being monitored, forging a good relationship with the potential employer takes precedence over insisting on contract compliance.

Even if government monitors proved competent, honest, and incorruptible, exclusive state monitoring of private prisons effectively extinguishes the public's ability to observe and affect an important part of the criminal justice system.³⁶⁹ Private prison operators insist that they can manage prisons more effectively than the government, in part because private firms are free from political pressures and bureaucratic red tape.³⁷⁰ Yet some governmental requirements such as the FOIA safeguard important public interests. In the FOIA,

363. See Gentry, *supra* note 77, at 357-58 (describing how a private firm that secures an initial contract can thwart the government's access to a competitive market).

364. *Id.* at 358.

365. *Id.* at 359.

366. *Id.* at 360.

367. Keating, *supra* note 3, at 146.

368. CCA FACILITY PROFILES, *supra* note 115, at 1-6.

369. See *infra* text accompanying note 404.

370. DiIulio, *supra* note 27, at 166.

Congress made a legislative determination that the government should not be trusted to run its affairs without public oversight.³⁷¹ By removing from public view records pertaining to federal private prisons, federal correctional agencies have created the very situation that the FOIA was intended to avoid.

*B. Amend the FOIA to Apply to Private Entities
That Perform Agency Functions*

One way to ensure that the public has access to the internal records of federal privatized prisons would be for Congress to amend the FOIA's definition of "agency" to include private entities that perform significant agency functions.³⁷² The open records acts of several states already apply to private organizations that act on behalf of state agencies.³⁷³ This solution, however, involves several drawbacks.

One major difficulty with amending the FOIA in this way relates to the scope of the amendment. If the definition of agency is expanded to apply to private organizations that contract with the government, then the FOIA will be enlarged dramatically and will include all private government contractors. The costs of increased administrative compliance and additional FOIA requests generated by such an amendment would be immense. In *Forsham*, the Court noted that applying the FOIA to documents which the government has "contractual access" would create a class of records of "staggering" proportions.³⁷⁴

Additionally, by making a private contractor an agency under the FOIA, all of the contractor's records would be

371. See *supra* text accompanying notes 127-29.

372. See *infra* text accompanying notes 404-07. The Supreme Court could accomplish the same result by ruling that for purposes of the FOIA, private prison management firms constitute agencies, or that such firms' records are agency records. However, in *Forsham v. Harris*, the Court refused to extend either definition to private grantees, indicating that it would be inappropriate for the Court to do so when Congress had not. 445 U.S. 169, 179-80 (1980).

373. E.g., FLA. STAT. ANN. § 119.011(2) (West 1985) (defining "[a]gency" as including any "public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency"); GA. CODE ANN. § 50-18-70(a) (Michie 1994) (defining "[p]ublic records" as records "received or maintained by a private person or entity on behalf of a public office or agency").

374. *Forsham*, 445 U.S. at 186 n.17.

subject to disclosure unless the statute limited disclosure to materials created in connection with the performance of a government function. If the definition is amended to restrict FOIA coverage to private entities that perform "governmental functions," then either Congress, the courts, or both will have to define that term to create a clear division between those contractors whose records will be subject to the FOIA and those whose records will not. To make daily decisions about FOIA requests, agencies need reliable, unambiguous standards.

Formulating a practical definition of government function will not be easy. Although it may appear relatively straightforward that a private entity hired by an agency to provide prison management services is performing a governmental function,³⁷⁵ the result in other contracting situations will not be so clear. For example, consider the situation in *Forsham* where a private entity conducted federally funded research regarding the safety and effectiveness of antidiabetes drugs.³⁷⁶ The data generated by the study were used by the FDA to regulate the use and labelling of the drugs.³⁷⁷ Was the research grantee in *Forsham* performing a governmental function? It could be argued that, at least in the modern era, citizens depend on the federal government to ensure the quality and safety of drugs. In the study at issue in *Forsham*, however, a fifteen million dollar federal grant generated fifty-five million records.³⁷⁸ Federally funded research and development produces several billion records per year.³⁷⁹ FOIA compliance is already a drain on the federal budget,³⁸⁰ and it is unrealistic to believe that Congress would amend the FOIA when such an amendment would pose an administrative burden.³⁸¹

375. See *supra* text accompanying notes 239-43.

376. For a discussion of the facts presented in *Forsham*, see *supra* text accompanying notes 166-72.

377. 445 U.S. at 172.

378. *Id.*

379. Walterscheid, *supra* note 244, at 49.

380. For example, the Department of Health and Human Services alone responded to more than 121,000 FOIA requests in 1987 at a cost of more than \$8.1 million. Cate et al., *supra* note 348, at 50.

Critics maintain that the benefits provided by the FOIA do not justify its price. For example, 15 years ago, Justice Antonin Scalia described the FOIA as the "Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored." Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION, Mar./Apr. 1982, at 14, 15.

381. Other predicted consequences of enlarging the FOIA to apply to private contractors acting as federal research grantees include the "righteous wrath of the

Florida's experience of bringing private entities that perform government functions under its public records statute illustrates the problems that can arise when formulating such a definition. In 1975, the Florida legislature amended its Public Records Act to apply to any private entity acting "on behalf of any public agency."³⁸² The amendment was enacted to prevent the state from contracting with private firms, thereby avoiding the statute's disclosure requirements.³⁸³ The statute defined public records as documents made "in connection with the transaction of official business by any agency."³⁸⁴

Despite this relatively plain language, Florida courts have struggled to determine which private entities are covered by the Act. In 1989, for example, a Florida appeals court held that a private towing company under city contract was performing a governmental function and, therefore, was subject to the disclosure requirements of the Public Records Act.³⁸⁵ In other cases, however, Florida courts have looked to federal case law to interpret the amendment.³⁸⁶ As a result, in 1992, the Florida Supreme Court held that an architectural firm hired by a local school board to provide services in connection with the construction of public schools was not acting "on behalf of" a public agency.³⁸⁷ In reaching its decision, the court relied on earlier Florida cases that had applied criteria used by federal courts to identify when a private organization had become an "agency" under the FOIA.³⁸⁸ The court reasoned that the school board had not created the architectural firm, nor did it control the firm's "activit[ies] or judgment."³⁸⁹ Furthermore, the court held that the firm was not performing a

university community" and the availability of American technology to foreign requesters, resulting in a threat to U.S. economic competitiveness. Walterscheid, *supra* note 244, at 53, 55-59.

382. FLA. STAT. ANN. § 119.011(2) (West 1994).

383. See *Times Publishing Co. v. City of St. Petersburg*, 558 So. 2d 487, 494 (Fla. Dist. Ct. App. 1990).

384. FLA. STAT. ANN. § 119.011(1) (West 1994).

385. *Fox v. News-Press Publishing Co.*, 545 So. 2d 941 (Fla. Dist. Ct. App. 1989).

386. See, e.g., *Parsons & Whittemore, Inc. v. Metropolitan Dade County*, 429 So. 2d 343, 346 (Fla. Dist. Ct. App. 1983); see also Marguerite L. Robinson, Note, *Detectives Following the Wrong Clues: Identification of Private Entities Subject to Florida's Public Records Law*, 22 STETSON L. REV. 785, 790-91 (1993) (discussing the application of federal FOIA case law to the Florida Public Records Act).

387. *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group*, 596 So. 2d 1029, 1032 (Fla. 1992).

388. *Id.* at 1031.

389. *Id.* at 1032.

government function because it had not been delegated any decision-making authority by the school district.³⁹⁰

By applying federal criteria inappropriate for interpreting the Florida Public Records Act amendment, the state court neatly sidestepped the purpose of the amendment.³⁹¹ The case highlights the application and definitional problems that could arise upon any amendment to the FOIA that attempts to extend it to private prison management firms. Nothing guarantees that the federal courts, like the Florida Supreme Court, will not look to old case law to interpret a new amendment.

Although a FOIA amendment applying the Act to private prison managers could subject internal prison records to FOIA disclosure, this expansion will not be enough alone to ensure accountability. Just as government monitoring by itself does not provide adequate oversight of federal privatized prisons,³⁹² neither does a public right of access to internal records, standing alone. Adequate monitoring must combine several techniques to safeguard prisoners' liberty interests and to protect against contractor abuses.³⁹³

C. Enact Federal Enabling Legislation Governing the Conditions Under Which Federal Agencies Can Delegate the Responsibility for Prison Management to Private Entities

Different methods have been proposed to ensure the accountability of privately operated prisons, including government monitoring and inspections,³⁹⁴ public and press visits to prison facilities,³⁹⁵ public access to prison records,³⁹⁶ and application of heightened standards of judicial review.³⁹⁷ Even

390. *Id.*

391. For a critical analysis of *Schwab*, see generally Robinson, *supra* note 386.

392. See *supra* text accompanying notes 360–65.

393. See, e.g., Keating, *supra* note 3, at 152 (calling for a "rich mixture" of monitoring approaches in private prisons to ensure accountability).

394. See, e.g., Robbins, *supra* note 2, at 752 (proposing a model contract which requires an on-site monitor with access to all areas and records of the facility).

395. See, e.g., *id.* at 752–53 (Model Contract § 6(B)) (providing for public access to private correctional facilities).

396. See, e.g., Gentry, *supra* note 77, at 363–65 (recommending public access to private prison records combined with a system of fines and bonuses imposed on private prison operators).

397. David N. Wecht, Note, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 834–37 (1987).

economic incentives and disincentives such as bonuses and fines³⁹⁸ and a royalty system based on recidivism rates have been suggested to align more closely the government's and the private operator's interests.³⁹⁹ While this Article has focused on the FOIA status of internal private prison records, it does not suggest that public access to contractor documents alone will ensure accountability. As noted earlier, effective monitoring involves many different means of observation and oversight.

In the federal context, however, nothing provides a set of uniform standards to guarantee that private prison operators are subjected to a minimum level of accountability. There is no uniformity because, unlike state legislatures that have turned prison operations over to private managers, Congress has not enacted legislation authorizing federal correctional agencies to privatize their facilities.⁴⁰⁰ This lack of legislative guidance means that federal agencies are free to use their discretion in setting, amending, or ignoring accountability standards in their contracts. Although a federal correctional agency may provide for a sophisticated monitoring system in its contracts today, nothing ensures that provisions for accountability will appear in future contracts.

This Article proposes that Congress pass legislation requiring that all prison records created and maintained by a private prison operator be subject to disclosure under the FOIA. By using the FOIA's existing framework, privacy interests of federal prisoners and prison personnel, as well as legitimate confidential commercial information belonging to prison managers, would still be protected by FOIA exemptions. In this way, prisoners and other FOIA requesters would be entitled to the same procedural remedies and safeguards that currently exist under the FOIA.

Additionally, such legislation should limit mandated disclosure to materials that pertain to the operation of private prison facilities. Such a limit would ensure that the legislation comports with the FOIA's purpose of providing access only to those records concerning important matters of public policy. Without this limitation, FOIA requesters could use the legisla-

398. Gentry, *supra* note 77, at 360-63.

399. Kenneth L. Avio, *On Private Prisons: An Economic Analysis of the Model Contract and Model Statute for Private Incarceration*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 265, 294-95 (1991).

400. See *supra* text accompanying notes 99-105.

tion to uncover information about prison management firms that bears no relation to the performance of a governmental function.

Congress could leave the terms of FOIA cost and compliance to negotiation between the government and the contractor. However, because the agency already will have established FOIA guidelines and be familiar with the Act's administrative requirements, it would make more sense to require the agency to carry out the task. By giving the agency the administrative burdens of indexing, searching for, and producing records, the private contractor will be less able to conceal or overlook requested documents.

A workable solution would be for the statute to provide that all records regarding the operations of a federal privatized prison be deemed as belonging to the contracting agency, and to give the agency the responsibility of making these records available to the public in accordance with the FOIA. Compliance with the FOIA is a "hidden cost"⁴⁰¹ that agencies already bear in operating public prisons. The cost of providing access to a private operator's records should not be substantially higher than what agencies already expend with respect to these public facilities.

By enacting legislation governing private prison operations, Congress will have an opportunity to address other important issues, besides access to records, that are raised by prison privatization. Privatization frequently has been criticized as undemocratic because it provides little room for citizen input to the creation of public policy.⁴⁰² Congress can add a measure of political accountability to the privatization equation by codifying policies regarding prisoner classification decisions, disciplinary sanctions, the use of force by private operators, determinations of good time for prisoners, and questions of contractor liability.⁴⁰³

The need for legislation providing a right of access to private prison records and facilities is especially acute because of Supreme Court decisions denying the existence of a First Amend-

401. See *supra* note 63 and accompanying text.

402. Al Bilik, *Privatization: Defacing the Community*, 43 LAB. L.J., 338, 342 (1992); Field, *supra* note 63, at 670.

403. For a general discussion of these issues, see Robbins, *supra* note 2 (reviewing a broad range of policy issues regarding private incarceration), and Woolley, *supra* note 4 (focusing on Pennsylvania legislation and providing a guide to corrections officers, government administrators, and legislators).

ment right of access to government-operated prisons.⁴⁰⁴ In one of these cases, *Houchins v. KQED, Inc.*, the Court, in a four to three decision, rejected a television station's claim of a First Amendment right of access to a county jail.⁴⁰⁵ Writing for the plurality, Chief Justice Burger stated that the issue of access was a legislative matter to be resolved by the political process.⁴⁰⁶ Although different interests would be presented in a case involving a private prison, the Court would likely consider access to privatized prisons also a matter for the legislature.

If so, unless Congress authorizes a public right of access to private prisons, citizens will lack any legally enforceable right to information regarding this important aspect of the criminal justice system. Like administrators prior to enactment of the FOIA, private prison operators will be free to exercise their "official grace" regarding whether, when, and how to communicate with citizens and the media.⁴⁰⁷ Although a detailed analysis is beyond the scope of this Article, if Congress refuses to implement a legislative solution establishing public accountability of privatized corrections, the Supreme Court should revisit the prison cases and mandate a constitutional right of access to private prisons for the public and the press under the First Amendment.

CONCLUSION

Prison privatization may prove to be all that its supporters claim: a way for the government to construct prisons more quickly, to manage prisons more economically, and to operate prisons with more flexibility, resulting in cheaper, more effective inmate care. No matter what arguments exist against private prisons, their existence of private prisons is a fact of life

404. These "prison cases" include *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (holding that a county sheriff's restrictive policy on access to county jail did not violate the First Amendment); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974) (upholding a federal prison ban on media interviews with specific prisoners); and *Pell v. Procunier*, 417 U.S. 817 (1974) (upholding a state prison ban on media interviews with specific prisoners). For a critical analysis of the prison cases, see Leonard G. Leverson, *Constitutional Limits on the Power to Restrict Access to Prisons: An Historical Re-examination*, 18 HARV. C.R.-C.L. L. REV. 409 (1983).

405. *Houchins*, 438 U.S. at 1.

406. *Id.* at 14-16.

407. See CROSS, *supra* note 123, at vii-xi.

in federal corrections. Government reliance on the private sector to provide correctional services is a trend that undoubtedly will continue.

Regardless of whether they are public or private, all prisons are secretive places. Along with secrecy comes the potential for abuse. Past experience reveals the importance of public oversight of prisons to protect the safety, well-being, and liberty interests of prisoners, as well as to ensure the proper expenditure of public funds. The accountability principle demands that private prisons must be at least as accountable to the public as government facilities are.

In at least one significant way, however, privatized federal facilities are even more impenetrable than government-operated prisons. Although records promulgated by federal correctional agencies are subject to public disclosure under the FOIA, documents maintained by private prison operators are largely inaccessible under the Act. By contracting with private prison operators, federal correctional agencies shield what otherwise would have been public information from public scrutiny. This frustrates the FOIA's purpose of guaranteeing the public the right to monitor government activities.

The Supreme Court has stated that "it is important that society's criminal process 'satisfy the appearance of justice'. . . and the appearance of justice can best be provided by allowing people to observe it."⁴⁰⁸ Congress can best ensure that federal privatized correctional facilities "satisfy the appearance of justice" by enacting legislation that subjects private operators to uniform standards of accountability. These standards must include a right of public access to records created and maintained by private prison operators as part of a comprehensive system of monitoring and oversight. Whatever public benefits may accrue from prison privatization are not worth the risks posed to prisoners and the criminal justice system by "the return of government secrecy through the agency back door."⁴⁰⁹

408. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571-72 (1980) (plurality opinion) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

409. O'Connell, *supra* note 340, at 627.

